SYNOPSIS OF BRIEF.

	Page.
STATEMENT OF FACTS	1
ASSIGNMENT OF ERROR	6
RATE-ACT OF 1862	14
RATE-ACT OF 1885	16

ARGUMENT.

THERE IS NO JURISDICTION OR CASE IN EQUITY.

1. No case for relief in equity was alleged or proven against defendants, and the Circuit Court had no jurisdiction in equity on the ground of preventing a multiplicity of suits, or on any ground, because the defendants sued have no power to enforce the rate-ordinance complained of, and it is not alleged or proven that they either threaten to, or are proceeding to, or that they can enforce it. Under the rate Act of 1885, defendants can do no act towards the enforcement of the ordinance, but its enforcement depends entirely upon the will and act of the ratepayers. Defendants cannot therefore be in privity with or represent the ratepayers as to the enforcement of the ordinance, and hence defendants are improperly sued 24-38

2. The Circuit Court had no jurisdiction in equity of this case, because complainant had an adequate remedy at law, in the statutory right given it to apply to the Supervisors to have the rates fixed anew 39-42

Page.

THERE IS NO IMPAIRMENT BY THE ACT OF 1885, OF THE OBLIGATION OF COMPLAINANT'S ALLEGED CONTRACT UNDER THE ALLEGED RATE ACT OF 1862.

1. The alleged rate act of 1862, is void because a local and special Act in violation of Section 31, Art. IV, of the Constitution of California of 1849, in that, eleven counties were excepted from the operation of the Act 42-45

2. Even if valid, the Act of 1862, was a mere regulation as to a public use and did not constitute with complainant an unalterable, or any contract, as to rates and basis of valuation, since the then State Constitution of 1849, and the State Constitution of 1879, both reserved to the State, the right to alter or repeal said Act of 1862, and the same was repealed by said Act of 1885, as to rates and basis of valuation 45-77

VALUATION OF THE IRRIGATING CANAL FOR PURPOSE OF FIXING RATES.

1. The Circuit Court erred in holding the original cost of the canal to be the chief and controlling element to be considered in valuing the canal. The cost, however, is an element to be duly considered under all the circumstances, in fixing such value. Under the Act of 1885, cost could be considered 77-93

2. The Circuit Court erred in holding that the Supervisors did not, in arriving at the value of the canal, consider its cost. On the contrary, the evidence shows that such cost must have been considered by the Supervisors 80

Page.

3. The Supervisors' valuation of the canal at $337,000.00 was fair and reasonable 80

4. The Supervisors' estimate of $20,000.00 as the annual cost of maintaining the canal was fair and reasonable 95

5. If the the valuation of the canal arrived at was fair and reasonable, the exact process by which the Supervisors may have arrived at such valuation is immaterial, and, in the absence of fraud, is not the subject of judicial inquiry. Here no fraud was alleged or proven 84-85

6. Complainant did not produce on the trial any satisfactory or competent proof of the cost of its canal, or of the expense of maintaining it 85-95

7. The canal was constructed in an extravagant manner 89

8. The amount of money complainant's stockholders may have paid it for their stock is not satisfactory evidence of the value of the canal 90

9. Complainant lost large sums in farming operations 90

10. The canal was assessed for taxation at a valuation of $170,000.00 only 94

11. The valuation complained of was reasonable considering, under the evidence, the canal as used and useful with reference to the acreage irrigated paying therefor, since it appears that although the canal was constructed to irrigate a large body of land, yet only a small part of it is cultivated and collected from, and that of such part, only about one-fifth is in Stanislaus County, and that of the 71½ miles of the canal, only 11½ miles thereof are in that county 92-111

Page.

THE RATES FIXED BY THE SUPERVISORS DID NOT AND DO NOT DEPRIVE COMPLAINANT OF ANY PROPERTY WITHOUT DUE PROCESS OF LAW.

1. Under the rates complained of and fixed in June, 1896, complainant's net income from the whole canal based upon rates it was entitled to collect was greater by $4,918.69 for 1897, and by $2,634.82 for 1898 than the average net annual income theretofore received by it 96

2. After the rates complained of had been fixed in June, 1896, by the Supervisors of Stanislaus County for that county only, complainant, of its own accord, reduced many of the rates that it had theretofore been charging and that it was entitled to charge and collect in the Counties of Merced and Fresno 99

3. The Circuit Court erred in holding the rates fixed by the Supervisors of Stanislaus County to be unreasonably low because of its theory that they should be considered by the Court as applying in all three counties; whereas, under the Act of 1885, they were applicable in the County of Stanislaus only, and whereas, as matter of fact, they were not applied by complainant in the said two other counties, wherein it, in fact, collected rates other than those fixed by the Supervisors of Stanislaus County for that county only. It may be said that, the whole case was decided by the Circuit Court on this erroneous theory, which was mere hypothesis, having no basis either in law or in fact 102-6

4. Even under such erroneous theory, complainant's annual net income was and is ample under the rates complained of..... 106-7

Page.

THE RATES COMPLAINED OF WERE REASONABLE, SINCE THE EVIDENCE SHOWS THAT, THE IRRIGATORS IN STANISLAUS COUNTY BEING AT THE LOWER END OF THE CANAL RECEIVED VERY POOR SERVICE..... 108-11

THE RATES COMPLAINED OF WERE REASONABLE CONSIDERING, UNDER THE EVIDENCE, THE CANAL AS USED AND USEFUL WITH REFERENCE TO THE ACREAGE IRRIGATED AND PAYING THEREFOR, SINCE IT APPEARS THAT, ALTHOUGH THE CANAL WAS CONSTRUCTED TO IRRIGATE A LARGE BODY OF LAND, YET ONLY A SMALL PART OF IT IS CULTIVATED AND COLLECTED FROM, AND THAT OF SUCH PART, ONLY ABOUT ONE-FIFTH IS IN STANISLAUS COUNTY, AND THAT OF THE 71½ MILES OF THE CANAL, ONLY 11½ MILES THEREOF ARE IN THAT COUNTY 92

IF THE OPERATION OF THE RATES COMPLAINED OF BE CONSIDERED WITH REFERENCE TO THE VALUE OF THE CANAL USED AND USEFUL IN STANISLAUS COUNTY ONLY, COMPLAINANT, UNDER SUCH RATES, RECEIVED AN AMPLE NET ANNUAL INCOME IN THAT COUNTY.. 111

AS SHOWING THAT THE RATES COMPLAINED OF WERE AND ARE REASONABLE, THE ACREAGE IRRIGATED AND COMPLAINANT'S INCOME HAVE INCREASED THEREUNDER 113

COMPLAINANT'S OTHER RATE THEORY THAT, IRRIGATORS IN STANISLAUS COUNTY AT THE END OF CANAL, WHO GET VERY POOR SERVICE, SHOULD PAY MORE FOR WATER THAN IRRIGATORS IN THE TWO UPPER COUNTIES WHO GET COMPARATIVELY MUCH BETTER SERVICE, IS ERRONEOUS 117

DISCRIMINATION IN RATES AND FREE WATER BY COMPLAINANT IN FAVOR OF AND TO MILLER & LUX, WHO OWN A MAJORITY OF COMPLAINANT'S STOCK AND CONTROL ITS BOARD OF DIRECTORS. Page.

1. Because of such discrimination in irrigating the cultivated lands of Miller & Lux, complainant fails to collect from them at least $8,000.00 annually 120-9

2. Because of such discrimination in irrigating with so-called "waste water" the uncultivated lands of Miller & Lux used for pasturing their thousands of cattle, complainant fails to collect from them at least $60,000.00 annually 129-147

COMPLAINANT, BEING GUILTY, AS THE EVIDENCE CLEARLY SHOWS, OF AFORESAID GROSS DISCRIMINATIONS IN FAVOR OF ITS CONTROLLING STOCKHOLDER, AND WHICH OPERATE MOST INEQUITABLY AGAINST THE OTHER IRRIGATORS, WILL NOT BE HEARD IN A COURT OF EQUITY TO COMPLAIN OF THE PUBLIC RATES FIXED BY THE SUPERVISORS, WHEN IT MANIFESTLY APPEARS THAT SUCH PUBLIC RATES COULD BE REASONABLY FIXED STILL LOWER, IF SUCH DISCRIMINATIONS WERE NOT PRACTISED BY COMPLAINANT. HE WHO ASKS EQUITY MUST DO EQUITY, AND HE MUST COME INTO A COURT OF EQUITY WITH CLEAN HANDS 127-141-7

No. 80.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903.

THE COUNTY OF STANISLAUS, IN THE STATE OF CALIFORNIA; THE BOARD OF SUPERVISORS OF SAID COUNTY OF STANISLAUS, GEORGE W. TOOMBS, ET AL.,
Appellants,

vs.

THE SAN JOAQUIN AND KINGS RIVER CANAL AND IRRIGATION COMPANY,
Appellee.

BRIEF ON BEHALF OF APPELLANTS.

STATEMENT OF FACTS.

This is a suit in Equity brought by the San Joaquin and Kings River Canal and Irrigation Company, a

corporation, against the County of Stanislaus, in the State of California, the Board of Supervisors of said County of Stanislaus, and George W. Toombs and the other members of said Board of Supervisors in their official capacities. The purpose of the suit and the prayer of the bill of complaint filed September 29th, 1896, was to have the Circuit Court adjudge to be void and to enjoin the enforcement by defendants of an ordinance or order adopted by said Board of Supervisors on the 26th day of June, 1896, fixing the water rates to be charged by complainant Irrigation Company in Stanislaus County, and for complainant's costs.

The case was tried, and the Circuit Court on the 8th day of January, 1902, made and entered its judgment and decree, granting the relief prayed for, and for $1870.30 costs, and defendants, on the 27th day of May, 1902, took and now prosecute their appeal from said judgment and decree.

Complainant alleges in its bill of complaint that, it was incorporated in 1871, under the Act of April 14, 1853 (Cal. Stats. 1853, p. 87), as amended by the Act of March 14th, 1862 (Cal. Stats. 1862, p. 540) appears that complainant bought out the San Joaquin and Kings River Canal Company (complainant's corporate name is the same with the word "Irrigation" added), (Rec. 55), and that complainant's irrigating canal takes by appropriation its water from the San Joaquin river, at Fresno slough, and carries

it from that point through the counties of Fresno, Merced and Stanislaus a distance of about seventy-one miles; but within that distance, there are, including parallels, about ninety-eight miles of canal, and including smaller laterals, the entire system is about 120 miles (Rec. 71, 187). The canal runs for eleven seven-tenths miles into Stanislaus County where it ends. (*There is a map of the canal at the end of the printed record.*)

In fixing the water rates in June, 1896, the Board of Supervisors proceeded under the authority of the Act of March 12th, 1885. (Cal. Stats. 1885, p. 95) upon the petition of twenty-five inhabitants and taxpayers of the County. The Board's determination of the matter was made at a hearing before it, of which hearing notice had been given, and at which hearing both said petitioners and complainant were present and introduced evidence.

The most material rates in controversy are those as to alfalfa and cereals. Complainant alleges that its regular rates, prior to the action of the Supervisors, were $2.50 per acre per annum for alfalfa and $2.00 per acre per annum for cereals. In each instance the Supervisors reduced the rates to $1.50 per acre per annum in Stanislaus County. The Board of Supervisors of Stanislaus having no jurisdiction as to rates in Fresno and Merced Counties, its rates could apply to Stanislaus County only.

Complainant also claims that, the Supervisors

should have valued its works at their original cost of $798,429.61 (Rec. 445), whereas the Supervisors valued them at $337,000. Because of these acts by the Supervisors, complainant alleges in its bill that the rates so fixed were so low as to prevent it from realizing a reasonable income on the value of its works, and that the said order fixing such rates deprived it of its property without due process of law, in violation of Section 1 of the XIV Amendment to the Constitution of the United States.

Under the Act of 1862, it was provided in Section 3 that, the County Supervisors should not fix the water rates so low as to yield to the stockholders of a water company less than eighteen per cent per year upon the capital actually invested, while under Act of 1885, it is provided in section 5 that the rates must be fixed so that they would yield per year, net receipts not less than six per cent upon the value of the works used and useful in the appropriation and furnishing of water. (*These Acts are printed in full in this brief.*)

On June 8th, 1899, nearly three years after the commencement of the suit, complainant amended its bill of complaint by alleging that it had an unalterable contract with the State of California under the Act of 1862, entitling it to not less than *eighteen per cent* net profit per year upon *the costs of its works,* and that the Act of 1885, providing for a less profit based *on the value of its works* was an impairment

by the State of said contract in violation of the provisions of Section 10 of Article I, of the Constitution of the United States (Rec. 33, 35).

At the time of the passage of the Act of 1862, the Constitution of 1849, of California, in Section 31, Article IV, reserved to the State the power to alter or repeal all laws relating to corporations. The same power was reserved to the State by Section 1 of Article XII of the Constitution of 1879.

On the trial, complainant expressly waived its allegation that its right to appropriate water had a value (Rec. 303-4). It was also alleged in the bill of complaint that, complainant would be harassed by a multiplicity of suits to require it to furnish water at the objectionable rates unless immediate relief should be granted. But it was not alleged in the bill that defendants, or any of them, were or was in any manner proceeding to or threatening to enforce the rates complained of or that they, or any of them, had any power to do so. No preliminary or provisional injunction was asked for.

Defendants demurred to the bill of complaint on the grounds, among others, that complainant had an adequate remedy at law; and that defendants had been improperly sued and that no relief could be had against them inasmuch as they had no power to enforce against complainant the rates complained of. The Circuit Court over-ruled the demurrer (Rec. 12, 15). By their answer, defendants denied all the

substantive allegations of the bill, and, in addition, averred that complainant's annual net receipts, under the rates complained of, would exceed nine per cent upon the value of its works. Also, that complainant discriminated in favor of Miller & Lux, its largest stockholder, by furnishing them water at rates less than those charged to its other consumers, and also by furnishing them water free of charge, and that complainant's revenue would be greatly increased if such discrimination was not practiced (Rec. 19, 29). Defendants also averred in their answer that, under the Constitution and laws of the State of California, they had no power to enforce the rates complained of. (Rec. 30).

As before stated, the Circuit Court gave and entered its judgment as prayed for by complainant.

ASSIGNMENTS OF ERROR.

These petitioners and appellants, defendants in said cause as aforesaid, respectfully submit that, said Circuit Court erred in its decision and decree in said cause in the following particulars for the following reasons, viz:

1. Because the Circuit Court did not determine whether the water rates established by the Board of Supervisors of Stanislaus County, and complained of in said suit, were valid or invalid in themselves, but set aside said water rates and enjoined their enforcement because the Court held that they were reached

by what was considered to be an erroneous method or process. The Court ought to have held that if the result reached by the Board was right, it was immaterial whether or not such result was reached by an erroneous method or process; and upon the evidence in the case the court ought to have held that said water rates were valid.

2. Because the Circuit Court held that, upon the evidence before it, it could ascertain or determine what was the method or process by which said Board of Supervisors arrived at its result—there being nothing in the evidence to indicate what method or process was resorted to by said Board of Supervisors in the premises.

3. Because the Circuit Court held that the method or process by which said Board of Supervisors arrived at said water rates was erroneous.

4. Because the Circuit Court held that the power reserved by the State of California, by its Constitution in force at the time the complainant's charter was obtained, to alter, amend or repeal the charters of corporations created under its laws, did not warrant or authorize the establishment of the particular rates complained of in his suit. The Court ought to have held upon the record before it that under said reserved power the State had the power and right to establish the particular rates complained of, either by an Act of the Legislature, or through the agency of a Board of Supervisors acting under the authority of an

act of the legislature, without reference to any question as to whether such rates would return a sufficient income to the complainant or to its shareholders; and ought to have held that such exercise of said reserved power was not in violation of the provision of the Constitution of the United States forbidding the impairment of the obligation of contracts.

5. Because the Circuit Court held that the power reserved by the State, by its Constitution in force at the time the complainant's charter was obtained, to alter, amend, or repeal the charters of corporations created under its laws, did not warrant or authorize the passage of the Act of March 12, 1885, under which the Board of Supervisors of Stanislaus County acted in fixing the water rates complained of in this suit, if said Act of 1885 should be construed to be inconsistent with the provisions of the Act of May 14th, 1862, (under which the complainant was incorporated) relating to the amount and basis of water rates.

6. Because the Circuit Court held that if said Act of March 12th, 1885, should be construed as intended to repeal or supersede the provisions of said Act of May 14th, 1864, relating to the amount and basis of water rates, said Act of 1885 would be in violation of the provisions of the Constitution of the United States, forbidding the impairment of the obligation of contracts.

7. Because the Circuit Court held that the pro-

visions in relation to the amount and basis of water rates, contained in said Act of May 14th, 1862, under which the complainant was incorporated, were not repealed or superseded by said Act of March 12th, 1885, under which said Board of Supervisors acted in fixing said water rates which are complained of in this suit.

The Court ought to have held that said Act of 1885 repealed and superseded the said Act of 1862, so far as the establishment of water rates is concerned.

8. Because the Circuit Court held that "the value "of complainant's property made by the Board of Su- "pervisors and the water rates fixed by the Board "with respect to such estimate did deprive the com- "plainant of property without due process of law, "and denied to it the equal protection of the laws."

9. Because the Circuit Court decreed that the order or ordinance of said Board of Supervisors complained of in this suit "deprived the complainant herein of its property without just compensation," and without due process of law.

10. Because the Circuit Court held that the water rates established by said order or ordinance of said Board of Supervisors deprived the complainant of its property without just compensation and without due process of law.

11. Because the Circuit Court held that the amount invested by the complainant, or by its predecessor in interest, or by both, should have been made a

controlling element in the fixing of the water rates.

12. Because the Circuit Court, in determining the question whether the complainant was deprived of its property without due process of law, or was denied the equal protection of the laws, or was deprived of its property without just compensation, did not make the market value of complainant's property the controlling or principal element. In determining said questions the Court should have made the market value of said property, in its then condition, the principal or controlling element, and should not have regarded the amount invested by the complainant, or by its predecessor, except in so far as the amount invested may have been evidence tending to show said market value.

13. Because there was no evidence before the Circuit Court showing that the value of the complainant's property was not as estimated by the said Board of Supervisors; and because upon the evidence before it the Court ought to have held that the rates fixed by said Board would allow a sufficient return to the complainant upon the value of its property, and that such rates could not be set aside or interferred with by the Courts.

14. Because there was no evidence before the Court showing that the complainant was deprived of its property without just compensation, or without due process of law, or that it was denied the equal protection of the laws.

15. Because the evidence before the Court showed that the water rates complained of in this suit were reasonable, fair and lawful rates.

16. Because the Circuit Court determined the question of the invalidity of the water rates complained of in this suit, upon the hypothesis that the other Counties through which the complainant's system extended might or would or ought to establish similar or proportionate rates to those established in Stanislaus County, and without reference to the returns actually received from said Counties other than Stanislaus.

The Court ought to have held that the rates complained of were valid if the complainant's whole system yielded a sufficient return upon the value of its property, even though the rates upon the portion of the system which is in Stanislaus County may have been insufficient; and it ought not to have made a decree against the appellants in the absence of a showing as to the returns from the whole system, or in the absence of a showing of the value of the complainant's property in Stanislaus County, as distinguished from the value of its property in said other Counties.

17. Because there was no satisfactory or sufficient evidence showing the portion or proportion of the complainant's return which came or which should properly come from Stanislaus County and the portion or proportions which came or which should properly come from the other Counties through

which the complainant's system extended, and no sufficient or satisfactory evidence showing the value of the portion or proportion of the complainant's property in Stanislaus County as distinguished from the value of its property in said other Counties.

18. Because the Circuit Court ignored the fact shown by the evidence that large quantities of the complainant's water was supplied free of charge to the lands of Henry Miller or Miller & Lux, who owned and own the majority of the stock of the complainant corporation, and by means of such ownership controlled and control the action of the complainant; the result of which feature is that, the effect of the Court's decision is that the water rates should be established so as to give a reasonable return to the complainant and its stockholders and a large quantity of free water to said Henry Miller and said Miller & Lux.

19. Because the Circuit Court ignored the fact shown by the record that during the taking of the evidence in the cause the complainant's solicitor repeatedly instructed witnesses for the complainant not to answer certain important and material questions propounded for the defendants, and that such witnesses, in obedience to such instructions, refused to answer, and did not answer such questions.

20. Because the Circuit Court ignored the fact, shown by the record, that the evidence produced on the hearing before the Board of Supervisors (at

which hearing the complainant was represented and in which it participated) justified, warranted and authorized the said rates fixed by said Board and complained of in this suit. The Court ought to have held that the action of said Board which was in accordance with and required by said evidence before it, was proper; and the Court ought not to have annulled and set aside the said action of said Board because it considered that evidence which was not before said Board required a different conclusion.

21. Because the Circuit Court held that the said ordinance or order of said Board of Supervisors fixing and establishing water rates, and the said water rates, fixed and established by said ordinance or order, were null and void. The Court ought to have held, upon the evidence before it, that said water rates and said ordinance or order was valid and binding.

22. Because the judgment of the Board of Supervisors of the County of Stanislaus, as to the value of complainant's property, made after hearing the complainant in this suit, is in the absence of fraud on the part of said Board binding and conclusive; and there is no showing in this case of any fraud on the part of said Board.

23. Because the rates fixed by the said Board of Supervisors, after hearing the complainant in this suit, *is* in the absence of fraud on the part of said

Board binding and conclusive, and there is no showing in this case of any fraud on the part of said Board. (Rec. 450, 458.)

ACT OF 1862.

(Cal. Stats. 1862, p. 540.)

An Act to authorize the incorporation of canal companies, and the construction of canals.

(Approved May 14, 1862.)

The people of the State of California, represented in Senate and Assembly, do enact as follows:

Section 1. Corporations may be formed, under the provisions of an Act entitled an Act to provide for the formation of corporations for certain purposes, passed April fourteenth, eighteen hundred and fifty-three, and the several Acts amendatory thereof and supplemental thereto, for the following purposes: The construction of canals, for the transportation of passengers and freights, or for the purpose of irrigation or water power, or for the conveyance of water for mining or manufacturing purposes, or for all of such purposes.

Sec. 2. The right is hereby granted to any company organized under the authority of this Act, to construct all works necessary to the objects of the company, to make all surveys necessary to the selec-

tion of the best site for the works, and of the lands required therefor, and to acquire all lands, waters not previously appropriated and other property necessary to the proper construction, use, supply, maintenance, repairs, and improvements, of the works, in the manner and by the mode of proceedings prescribed in an Act entitled an Act to provide for the Incorporation of Railroad Companies, and the management of the affairs thereof, and other matters relating thereto, passed May twentieth, eighteen hundred and sixty-one.

Sec. 3. Every company organized as aforesaid shall have power, and the same is hereby granted, to make rules and regulations for the management and preservation of their works, not inconsistent with the laws of this State, and for the use and distribution of the waters and the navigation of the canals, and to establish, collect and receive rates, water rents, or tolls, which shall be subject to regulation by the Board of Supervisors of the County or Counties in which the work is situated, but which shall not be reduced by the Supervisors so low as to yield to the stockholders less than one and one-half per cent per month upon the capital actually invested.

Sec. 4. Every company organized under the authority of this Act, shall construct, and keep in good repair at all times, for public use, across their canal, all of the bridges that the Board of Supervisors of the County or Counties in which such canal is situat-

ed shall require; said bridges being on the lines of public highways, and necessary for public use in connection with such highways.

Sec. 5. The provisions of this Act shall not apply to the Counties of Nevada, Placer, Amador, Sierra, Klamath, Del Norte, Trinity, Butte, Plumas, Calaveras, and Tuolumne.

Sec. 6. This Act shall take effect from and after its passage.

ACT OF 1885.

(Cal. Stats. 1885, p. 95.)

An Act to regulate and control the sale, rental and distribution of appropriated water in this State, other than in any city, city and county, or town therein, and to secure the rights of way for the conveyance of such water to the places of use.

(Approved March 12, 1885.)

The people of the State of California, represented in Senate and Assembly, do enact as follows:

Section 1. The use of all water now appropriated or that may hereafter be appropriated, for irrigation, sale, rental or distribution, is a public use, and the right to collect rates or compensation for use of such water is a franchise, and except when so furnished to any city, city and county, or town, or the inhabitants thereof, shall be regulated and controlled in the counties of this State by the several Boards of Super-

visors thereof, in the manner prescribed in this Act.

Sec. 2. The several Boards of Supervisors of this State, on petition and notice as provided in Section 3 of this Act, are hereby authorized and required to fix and regulate the maximum rates at which any person, company, association, or corporation having, or to have appropriated water for sale, rental or distribution, in each of such counties, may and shall sell, rent, or distribute the same.

Sec. 3. Whenever a petition of not less than twenty-five inhabitants, who are tax-payers of any county of this State shall, in writing, petition the Board of Supervisors thereof, to be filed with the clerk of said Board, to regulate and control the rates and compensation to be collected by any person, company, association or corporation, for the sale, rental, or distribution of any appropriated water, to any of the inhabitants of such county, and shall in such petition specify the persons, companies, associations, or corporations, or any one or more of them, whose water rates are therein petitioned to be regulated or controlled, the clerk of such Board shall immediately cause such petition together with a notice of the time and place of hearing thereof, to be published in one or more newspapers published in such county; and if no newspaper be published therein, then shall cause copies of such petition and notice to be posted in not less than three public places in such counties, and such publication and notice shall be for not less

than four weeks next before the hearing of said petition by such Board; such notice to be attached to said petition shall specify a day of the next regular term of the session of the said Board, not less than thirty days after the first publication or posting thereof, for the hearing of said petition, which shall impart notice to all such persons, companies, associations, and corporations mentioned in such petition, and all persons interested in the matters of such petition and notice. Such Board may also cause citations to issue to any person or persons within such county, to attend and give evidence at the hearing of such petition, and may compel such attendance by attachment.

Sec. 4. At the hearing of said petition, the Board of Supervisors shall estimate, as near as may be, the value of the canals, ditches, flumes, water chutes, and all other property actually used and useful to the appropriation and furnishing of such water, belonging to and possessed by each person, association, company or corporation, whose franchise shall be so regulated and controlled, and shall in like manner estimate as to each of such persons, companies, associations, and corporation, their annual reasonable expenses, including the cost of repairs, management and operating such works; and for the purpose of such ascertainment, may require the attendance of persons to give evidence and the production of papers, books and accounts, and may compel the attendance of such persons and the production of papers, books, and ac-

counts by attachments, if within their respective counties.

Sec. 5. In the regulation and control of such water rates, for each of such persons, companies, associations, and corporations, such Board of Supervisors may establish different rates at which water may and shall be sold, rented or distributed, as the case may be; and may also establish different rates and compensation for such water so to be furnished for the several different uses, such as mining, irrigating, mechanical, manufacturing and domestic, for which such water shall be supplied to such inhabitants, but such rates as to each class shall be equal and uniform. Said Boards of Supervisors, in fixing such rates, shall, as near as may be, so adjust them that the net annual receipts and profits thereof to the said persons, companies, associations, and corporations so furnishing such water to such inhabitants shall be not less than six nor more than eighteen per cent upon the said value of the canals, ditches, flumes, chutes and all other property actually used and useful to the appropriation and furnishing of such water of each of such persons, companies, associations and corporations; but in estimating such net receipts and profits, the cost of any extensions, enlargements, or other permanent improvements of such water rights or water works, shall not be included as part of the said expenses of management, repairs, and operating of such works, but when accomplished, may and shall

be included in the present cost and cash value of such work. In fixing said rates, within the limits aforesaid, at which water shall be so furnished as to each of such persons, companies, associations, and corporations, each of said Board of Supervisors may likewise take into estimation any and all other facts, circumstances and conditions pertinent thereto, to the end and purpose that said rates shall be equal, reasonable and just, both to such persons, companies, associations, and corporations and to said inhabitants. The said rates when so fixed by such board, shall be binding and conclusive for not less than one year next after their establishment, and until established anew or abrogated by such Board of Supervisors, as hereinafter provided. And until such rates shall be so established, or after they shall have been abrogated by such Board of Supervisors, as in this Act provided, the actual rates established and collected by each of the persons, companies, associations and corporations, now furnishing or that shall hereafter furnish, appropriated waters for sale, rental or distribution, to the inhabitants of any of the counties of this State, shall be deemed and accepted as the legally established rates thereof.

Sec. 6. At any time after the establishment of such water rates by any Board of Supervisors of this State, the same may be established anew, or abrogated in whole or in part by such Board, to take effect not less than one year next after such first establishment, but

subject to said limitation of one year, to take effect immediately in the following manner: Upon the written petition of inhabitants, as hereinbefore provided, or upon the written petition of any of the persons, companies, associations or corporations, the rates and compensations of whose appropriated waters have already been fixed and regulated, and are still subject to such regulation by any Board of Supervisors of this State, as in this Act provided; and upon the like publication or posting of such petition and notice and for the like period of time as hereinbefore provided, such Board of Supervisors shall proceed anew, in the manner hereinbefore provided, to fix and establish the water rates for such person, company, association or corporation or any number of them, in the same manner as if such rates had not been previously established, and may, upon the petition of such inhabitants, but not otherwise, abrogate any and all existing rates theretofore established by such board. All water rates when fixed and established as herein provided, shall be in force and effect until established anew or abrogated, as provided in this Act.

Sec. 7. Each Board of Supervisors of this State, when fixing and establishing, or fixing and establishing anew, or abolishing any previously established water rates, as hereinbefore provided, shall cause a record to be made thereof in the records of such Board, and cause the same to be published or posted in the manner and for the time required for

the publication or posting of said petitions and notices.

Sec. 8. Any and all persons, companies, associations, or corporations, furnishing for sale, rental, or distribution, any appropriated waters to the inhabitants of any county or counties of this State (other than to the inhabitants of any city, city and county, or town, therein), shall so sell, rent, or distribute such waters at rates not exceeding the established rates fixed and regulated therefor by the Boards of Supervisors of such counties, or as fixed and established by such person, company, association, or corporation as provided in this Act.

Sec. 9. If any person, company, association, or corporation, whose water rates for any county of this State have been fixed and regulated by a Board of Supervisors, as in this Act provided, and while such rates are in force, shall collect for any appropriated water furnished to any inhabitant of such county water rates in excess of such established rates, shall be liable in an action by any such inhabitant so aggrieved, to a recovery of the whole rate so collected, together with actual damages sustained by such inhabitant with costs of suit.

Sec. 10. Every person, company, association, and corporation having in any county in the State (other than in any city, city and county, or town, therein), appropriated waters for sale, rental, or distribution, to the inhabitants of such county, upon demand therefor, and tender in money of such established

water rates, shall be obliged to sell, rent or distribute such water to such inhabitants at the established rates regulated and fixed therefor, as in this Act provided, whether so fixed by the Board of Supervisors or otherwise, to the extent of the actual supply of such appropriated waters of such person, company, association, or corporation, for such purposes. If any person, company, association or corporation having waters for such use, shall refuse compliance with such demand, or shall neglect, for the period of five days after such demand to comply therewith to the extent of his or its reasonable ability so to do, shall be liable in damages to the extent of the actual injury sustained by the person or party making such demand and tender, to be recovered with costs.

Sec. 11. Whenever any person, company, association or corporation shall have acquired the right to appropriated water, or shall have acquired the right to apropriate such water in this State, such person, company, association or corporation may proceed to condemn the lands and premises necessary to such right of way, under the provisions of title seven, of part third, of the Code of Civil Procedure of this State, and amendments made and to be made thereto, and all the provisions of said Code, so far as the same can be made applicable, relating to the condemnation and taking of property for public uses, shall be applicable to the provisions of this Act.

Sec. 12. This Act shall take effect and be in force from and after its passage.

ARGUMENT.

I.

THE CIRCUIT COURT HAD NO JURISDICTION IN EQUITY OF THIS CASE.

1. THE CIRCUIT COURT HAD NO JURISDICTION IN EQUITY ON THE ALLEGED GROUND OF PREVENTING A MULTIPLICITY OF SUITS, BECAUSE THE DEFENDANTS SUED HAVE NO POWER TO ENFORCE THE RATES AND BECAUSE THE DECREE PRAYED FOR AND OBTAINED IN THIS CASE CANNOT BIND THE RATE-PAYERS WHO ARE NOT PARTIES HEREIN, AND WHO ALONE HAVE THE RIGHT TO ENFORCE THE RATE-ORDINANCE. DEFENDANTS ARE IMPROPERLY SUED, AND NO CASE IN EQUITY WAS EITHER ALLEGED OR PROVED AGAINST THEM.

Complainant alleged in its bill of complaint "that "unless immediate relief is granted, your orator will "be harassed by a multiplicity of actions to enforce "and require it to furnish its waters to its customers "and all persons desiring to use the same at the rates "fixed by the defendants in this cause." (Rec., 7.)

This allegation was denied in the answer. (Rec., 29.)

The only parties made defendants are the County of Stanislaus and the members of the Board of Supervisors of that county, in their official capacities as Supervisors. The decree prayed by complainant

was, in substance, that the rate-ordinance passed by the Supervisors of Stanislaus County be declared invalid and void, and that an injunction issue restraining the County of Stanislaus and its Supervisors from enforcing it. (Rec., 8.) And such, substantially, was the decree made by the Circuit Court. (Rec., 36.)

The rate-ordinance complained of was passed by the said Supervisors on the 26th day of June, 1896, solely under the authority of an Act of the Legislature of the State of California, enacted in 1885, and which is printed in full in this brief preceding this argument.

That Act provides, so far as is material to this point, that the Supervisors, upon notice and hearing, shall fix the rates to be charged by complainant Irrigation Company. (Secs. 3, 4, 5.) It is then provided in Section 9 of the Act that, should the complainant, after such rates are so fixed, collect rates in excess of those so fixed, it should be liable *to the person aggrieved,* in an action by him, to a recovery of the whole rate so collected, together with actual damages sustained by him, with costs of suit; and in Section 10 that, should complainant, upon the tender to it of the rate so fixed and a demand for the water, refuse to comply to such demand to the extent of its reasonable ability, it shall be liable in damages to the extent of the actual injury sustained by the person making such demand. *The statute in question*

nowhere provides that the county or its Supervisors, or any official, shall enforce the rate-ordinance, or have anything whatever to do with its enforcement.

All matters relating to the enforcement of the ordinance are entirely in the hands and under the *exclusive control of the rate-payers, and they may or may not enforce it as they see fit.* This being so, it appears that complainant, to prevent the enforcement of this rate-ordinance, has herein sued, not the persons who alone have the express authority and right to enforce it, but those who have no authority to enforce it, and who have no interest in seeing that it is enforced, and who have no duty or obligation in connection with it after its passage. This point was made on demurrer to the bill of complaint, and, as their brief shows, was urged by counsel for defendants; but the Judge of the Circuit Court, in his opinion overruling the demurrer, did not refer to it. (Rec., 12, 13, 15.) (90 Fed. Rep., 516.) It is, of course, obvious that, if this point be well taken, the decree prayed for and granted in this suit, viz., enjoining the County of Stanislaus and its Supervisors from enforcing this rate-ordinance, and for $1,870.30, costs, is a vain and useless thing, since it would not be *res adjudicata* as to the right of each rate-payer to enforce the ordinance. The substantive question presented therefore is, were the County of Stanislaus and its Supervisors, at the time this suit was brought, September 29, 1896, three months after

the passage of the ordinance, the representatives of and in privity with the rate-payers in that county to the extent that a judgment against the former binds and estops the latter? We say that such cannot be so, in law or in fact, because immediately upon the passage of the ordinance, the County and its Supervisors, in law and in fact, ceased to be, in any sense or degree, the representatives of or in privity with the rate-payers, with reference to the enforcement of the rates provided by the ordinance.

An inspection of the Act of 1885 will fail to show that the County or its Supervisors have, after its passage, authority to do a single act or thing, providing for the enforcement in any manner of this rate-ordinance. It therefore seems clear that there cannot be the slightest ground for complainant's contention that the defendants in this suit represent the rate-payers in the matter of enforcing this ordinance. The County and its Supervisors cannot represent the rate-payers without some authority by statute, and there is no such statute. There being no right in the defendants to represent the rate-payers in the matter of enforcing this ordinance, *and its enforcement being entirely dependent upon the will and acts of the rate-payers,* it follows that no such privity exists between them as would bind the rate-payers by a judgment in this suit against the defendants.

Again, this ordinance vested in each rate-payer the property right or privilege to the reduced rate

fixed by this ordinance, and in order to hold that he can be deprived of this property right or privilege in a suit to which he is not a party, and in which he is not given an opportunity to be heard in defense of his rights, it should appear in the clearest manner, and not by mere implication, that the defendants in such suit have the legal right to represent him.

In *New Orleans Water Works Co.* vs. *New Orleans,* 164 U. S., 471, the water company claimed to possess the exclusive right to lay certain pipes and furnish water in a certain part of the City of New Orleans, and it was charged in the bill of complaint, which was against the city alone, that the city had, by ordinance, granted to a large number of corporations, associations and individuals the privilege of laying pipes and conveying water in derogation of complainant's exclusive rights, and a decree was prayed to adjudge said ordinances to be void, to have them recalled and cancelled, and to enjoin the city from granting any further like privileges. This Court decided that such relief could not be granted because it would be in derogation of the rights of persons claiming under the ordinances, and that such persons were not parties to the suit. Mr. Justice Harlan delivered the opinion of the Court, saying: "It appears from the bill of complaint—the "facts therein set forth being admitted by demurrer "—that the City of New Orleans has, by ordinance, "granted to a large number of corporations, asso-

"ciations and individuals the privilege of laying "pipes in its streets for the purpose of conveying "water to their respective premises from the Missis- "sippi. These ordinances, the plaintiff contends, "are in derogation of its rights and privileges as "heretofore declared and adjudged by this Court in "the *Rivers* and *Tamany cases. None of the parties "for whose benefit the ordinances above referred to "were passed were brought before the Court or "given an opportunity to be heard.* Nevertheless, "the plaintiff seeks a decree, not only declaring these "ordinances to be null and void, but requiring the "city within a named time to recall, expunge, repeal "and cancel each ordinance that does not relate to "premises contiguous to the Mississippi River; and "if the city does not within such time, and in some "public way, cancel and annul those ordinances, "then that the Court, in this suit, shall adjudge and "decree them to be null and void, as legally inter- "fering with the rights of plaintiff. We do not sup- "pose that any precedent could be found that would "justify a court of equity in giving such relief. *A "decree declaring the ordinances in question void "would have no effect in law upon the rights of the "beneficiaries named in the ordinances, for, in the "absence of the parties interested and without their "having an opportunity to be heard, the Court "would be without jurisdiction to make an adjudi- "cation affecting them.* Such a decree would ap-

" pear upon the very face of the record, not to be due " process of law, and could be treated everywhere " as a nullity. *Windsor* vs. *McVeigh*, 93 U. S., 274, " 277; *Pennoyer* vs. *Neff*, 95 U. S., 714, 733; *Scott* " vs. *McNeal*, 154 U. S., 34, 46." (p. 480.) (*Italics ours.*)

We fail to perceive any difference in principle between the foregoing case and the one at bar. In each, persons claim substantive property rights conferred by ordinance. In each, *the assertion and enforcement of such rights are dependent upon the will and acts of such persons only*, and not upon the will or acts of the municipal bodies granting them; and in each, such persons are not made parties to bills in equity to abrogate such rights.

St. Louis & San Francisco Ry. Co. vs. *Gill*, 156 U. S., 649, is also in point. That case was an action at law by an individual to recover of the railroad company a statutory penalty for charging him excessive fares. The fares had been fixed by an Act of the Legislature of Arkansas (p. 651), and there was no commission or officer authorized *to enforce* the Act (p. 666). As to the proper remedy in such case this Court, through Mr. Justice Shires, said: " Sometimes in acting on this subject the State Leg- " islatures have created commissions or boards of " public works with power to establish rates for the " transportation of passengers and freight, and *in* " *such instances* the course recommended by Mr.

"Justice Miller, already cited, may well be fol-
"lowed; that the remedy for a tariff alleged to be
"unreasonable should be sought by bill in equity or
"some equivalent preceding, wherein the rights of
"the public as well as those of the company com-
"plaining can be protected. But there are other
"cases, and the present is one, where the legislatures
"choose to act directly on the subject by themselves
"establishing a tariff of rates and prescribing penal-
"ties. *In such cases there is no opportunity to resort*
"to a compendious remedy, such as a proceeding in
"equity, because there is no public functionary or
"commission which can be made to respond, and
"therefore, if the companies are to have any relief it
"must be found in a right to raise the question of the
"reasonableness of the statutory rates by way of de-
"fense to an action for the collection of the penal-
"ties." (p. 666.) (*Italics ours.*) This is directly applicable to the Act of 1885, under which the Board of Supervisors are given no power to enforce the rates, and where the power of enforcement is vested in the rate-powers only.

There is no principle of equity that will sustain a bill against a legislative body, even exercising judicial functions, for the *sole purpose* of having its statute or ordinance adjudged invalid. An Act of a legislative body can be declared invalid only in a case where its enforcement would inflict a wrong. The remedy by injunction is to prevent wrong, and conse-

quently, a suit like this can only be maintained to prevent such enforcement and against those whose duty it is, or who have a right to enforce the invalid statute or ordinance. This doctrine would seem to be elementary. Such have been the nature of the suits in equity in rate fixing and kindred cases that have been decided by this Court.

Chicago B. & Q. R. R. Co. vs. *Iowa* (94 U. S. 155), was a bill in equity filed by the lessee of a railroad company to restrain the Attorney-General of the State of Iowa "*from prosecuting suits against it or its officers*" for the violation of an act of the legislature establishing the maximum rates of fare and freight.

Peik vs. *Chicago, etc., Ry.* (94 U. S. 164), was a bill in equity by stockholders and bondholders of a railroad company to restrain the company from obeying, and the Railroad Commissioners and the Attorney-General *from enforcing,* as they were given power to do, the provisions of an act of the legislature limiting the rates of fare and freight (p. 165).

Railroad Commission Cases (116 U. S. 307), was a bill in equity to restrain the Railroad Commissioners of Mississippi *from enforcing,* as they had power to do, the provisions of an Act of the Legislature (pp. 307-8), providing for the fixing by the Com-

mission of a tariff of rates, and providing penalties for its violation (pp. 313-14).

Georgia Railroad vs. *Smith* (128 U. S. 174), was a bill in equity against the Railroad Commissioners and the Attorney-General of the State of Georgia to enjoin the Commissioners from prescribing rates of fare and freight over the complainants road "*or in* "*any manner enforcing* the provisions of the act "against them." (pp. 176-7). The act was not only to provide for fixing rates by the Commissioners but to prohibit the roads from charging other than reasonable rates "and to punish the same." (p. 176).

Reagan vs. *Farmers' Loan etc., Co.* (154 U. S. 362), was a bill in equity on behalf of the bondholders of a railroad company, against the Railroad Commissioners and the Attorney-General of the State of Texas to restrain them from making *or enforcing* rates of fare and freight for said company, they having such authority (pp. 362-9).

Covington Turnpike Co. vs. *Sandford* (164 U. S. 578), was a bill in equity filed by the persons residing along the road of a turnpike company, *to restrain it from carrying out its announced purpose* of disregarding the rates of toll fixed by an act of the Legislature (p. 580).

Smyth vs. *Ames* (169 U. S. 466), was a bill in equity by stockholders in a corporation to enjoin the Attorney-General and other officers of the State, constituting the Board of Transportation, *from enforcing*, as they had authority to do, the provisions of an act of the Legislature in relation to rates. The act was to fix reasonable maximum rates of freight upon railroads and "to provide penalties for the violation of this act" (p. 470). The decree, among other things, enjoined the Board of Transportation "from instituting or prosecuting or causing to be instituted or prosecuted any action or proceeding, "civil or criminal, against either of said companies," etc., and that "the Attorney-General of this State be "in like manner enjoined from bringing or causing "to be brought any proceeding by way of injunction, "mandamus, civil action or indictment against said "companies." etc. (p. 477.)

San Diego L. & T. Co. vs. *Nat. City* (174 U. S. 739). This case related to the fixing of water rates by the Board of Trustees of National City, in California, and was not under the acts involved in the case at bar, but under the Constitution of the State and the Act of 1881. The constitution does not charge the legislative body with any duty after the ordinance fixing the rate is passed; but the Act of 1881, passed in pursuance of the constitution, provides that if any greater rates are charged or collect-

ed than those authorized by law, the company "*upon* "*complaint* of said Board of Supervisors, Town "Council, Board of Aldermen, or other legislative "body thereof, or of any water-rate payer, and upon "conviction before any court of competent jurisdic- "tion, shall forfeit the franchises and works," etc. (Laws 1881, p. 54, Sec. 8). The report of the case in the Supreme Court does not disclose the kind of suit or proceeding, but the record of the case in the Court below shows that the case was a bill in equity brought for the purpose of having the rates fixed adjudged to be void "*and their enforcement enjoined.*" (74 Fed. p. 80.)

Cotting vs. *Kans. City Stockyards Co.* (183 U. S. 79). The report of this case in this Court states that it was by a stockholder against his corporation and the State of Kansas. The report of the case in the Court below, however, shows that this was an abbreviation; and that the bill was against the stockholders corporation and *the Attorney-General* of the State of Kansas, to enjoin the *enforcement* of an Act of the Legislature (79 Fed. Rep. p. 680). The Act among other things established rates for the handling and feeding of cattle, and provided penalties for its infraction (183 U. S. pp. 680-1).

Detroit vs. *Detroit Citizens' St. Ry. Co.* (184 U. S. 368), was a suit in equity to have adjudged void as impairing the obligation of contract, and to enjoin

the enforcement of an ordinance changing certain rates of fare.

The question as to whether or not the Circuit Court had jurisdiction of the suit, as a suit in equity, was not raised by the defendant, but appears to have been first raised by this Court itself.

It was held by this Court that, the jurisdiction of the Circuit Court would be sustained, but such decision was based largely upon the fact that the defendant neither made nor urged any objection against jurisdiction. It further appeared in that case and was alleged in the bill of complaint that, upon complainant's refusal to obey the ordinance it would be subjected to numerous suits, and that the City of Detroit threatened by vexatious legal proceedings to *compel complainant's compliance with the invalid ordinance,* and this last allegation was admitted by the answer (pp. 370-2). It also appeared that the ordinance could be enforced, or its enforcement attempted against complainant, by the city officers who had been made parties defendant (p. 380).

San Diego L. & T. Co. vs. *Jasper* (189 U. S. 439), was a suit in equity brought against the Supervisors of San Diego County and the twenty-five petitioning tax-payers to have declared invalid and to enjoin the enforcement of the water rate ordinance passed by the Supervisors under the Act of 1885, involved in the case at bar. The Circuit Court held the water

rates sufficient and dismissed the bill, whereupon the Water Company appealed to this Court. It seems that the twenty-five defendant tax-payers made default and that the bill was taken *pro confesso* as to them, and that appellant, the Water Company, then claimed that the Supervisors had no authority to defend the suit (p. 440).

This Court, through Mr. Justice Holmes, held otherwise (p. 441). It will be observed as to this decision in the first place that, it was in response to the Water Company's effort to have the Court decide that the Supervisors were not a proper parties defendant in face of the fact that the Water Company had made them parties, and, secondly, that the question presented in the case at bar as to whether or not the Supervisors represented the rate-payers *for the purpose of enforcing the rate* does not appear to have been presented to the Court, or decided.

The Supervisors made no such point or defense in that case, for the Court says, "the Board is here ad-"hering to and defending its action, professing still "to be satisfied" (p. 441). But in the case at bar, the defendant County and its Supervisors have throughout all the proceedings contended that they are improperly sued.

Upon consideration of the Act of 1885, of the foregoing decisions and of the principles involved, we do not see how it can be successfully maintained that the County of Stanislaus, or its Supervisors, in any

sense can be held to represent the rate-payers with reference to the enforcement of this ordinance, especially since its enforcement is left by the statute entirely at the will of each rate-payer. *None of the* rate-payers may enforce this ordinance by legal proceedings. There is no allegation in the bill of complaint that any of them threaten to do so. *There is not even any allegation in the bill nor proof on the trial that the defendants, or any of them, threaten any sort of litigation or proceeding against complainant or its property.* This being so, it does not appear that complainant ever was or is in danger of a multiplicity of suits; and finally, even should suits be imminent, we cannot see how they can be enjoined unless those who alone can enforce the ordinance, are before the Court and given an opportunity to defend their rights.

THERE CAN BE NO ESTOPPEL BY IMPLICATION.

If the defendants represent the rate payers as to the enforcement of these rates, such representation, and hence the estoppel of the judgment, can arise only because of some attenuated sort of implication. But it is well settled doctrine that estoppel by judgment cannot arise by implication, but must be certain to every intent.

Russell vs. *Place,* 94 U. S. 606.
Richardson vs. *Eureka,* 110 Cal. 445.
Aiken vs. *Peck,* 22 Vt. 260.
Fink vs. *Martin,* 5 La. Ann. 104.

2. THE CIRCUIT COURT HAD NO JURISDICTION OF THIS SUIT IN EQUITY BECAUSE COMPLAINANT HAD AN ADEQUATE REMEDY AT LAW.

It is settled by decisions of this Court, that persons seeking relief from erroneous or oppressive taxation, where no fraud is charged, cannot apply to a Court of equity for relief, until they have exhausted the State statutory remedies provided for the correction of the alleged invalid assessments or levies.

Supervisors vs. *Stanley,* 105 U. S., p. 315.
Stanley vs. Supervisors, 121 U. S., p. 550.

The same principle applies to this case. By Section 6 of the Act of 1885, it is provided that the water rates fixed by the Supervisors can, on application of the Water Company, be abrogated and new rates fixed; such new rates "to take effect not lesss than one year next after such first establishment." In this case, the obnoxious rates went into effect on the 26th day of June, 1896 (Rec. 460), so that, under the terms of the statute, complainant could have applied to the Supervisors immediately after the rates had been so fixed, for their abrogation and for new rates, and which new rates could have been put into opera-

tion on the 26th day of June, 1897. Complainant having failed to apply for such relief under the statute, cannot maintain this suit. There is no allegation in the bill or proof in this case that the Supervisors were corrupt or guilty of fraud.

In *San Diego L. & T. Co.* vs. *Jasper,* 189 U. S. 439, this Court said as to the point here made and as to this same statute of 1885, "Coming now to the "merits, the first thing to be noticed is that the ordi- "nance complained of took effect in November, "1897, and that after a year from that date appellant "was free to apply for a modification of the rates. "It did not do so. There is no allegation or sugges- "tion that the Board is corrupt or that it proposes "and intends, without regard to evidence, to adhere "to unjust rates so as to destroy or impair the value of "appellant's works. Under such circumstances the "question arises whether this is much more than a "moot case, in view of the principles adverted to in "*Tennessee* vs. *Condon,* ante p. 64, or at least "whether appellant should not be required to ex- "haust its other remedies before coming into "Court."

In the case at bar, the rates went into effect June 26th, 1896, the bill of complaint was filed on the 29th day of September, 1896 (Rec. 9). No preliminary or provisional injunction was asked for, but complainant up to the close of the testimony on the

trial on December 1st, 1899 (Rec. 446), collected for at least the years 1897 and 1898, from the rate-payers in Stanislaus County only the rates so fixed in June, 1896, and here attacked as invalid (Rec. 103, 416, 430). This suit was argued and submitted for decision on December 20th, 1899, and decided by the Circuit Court on the 6th day of January, 1902 (Rec. 51).

Consequently it appears with certainty from this record that, an application to the Supervisors under the Statute for a modification of the rates would have furnished a far speedier remedy than by resorting to this suit. Under the law, such application was open to complainant. It was an adequate remedy, and it could not, in law, be held to have been inadequate until it had at least been tried and exhausted. The rates could not have operated any hardship on complainant, since until the end of the irrigation year on June 30th, 1897, it could not have been ascertained with any certainty, how the rates would affect its business. Complainant, after the fixing of the alleged unfair rates, even voluntarily reduce its rates in the Counties of Merced and Fresno (Rec. 122, 421, 435). From all of which we contend that, complainant had an adequate remedy at law, and hence cannot maintain this suit in equity, and that this suit presents a mere moot or academic question.

Should it be held that, for any reason, complainant had no adequate remedy at law, then its remedy

in equity was to sue the rate-payers as indicated by the learned author where he says that a bill will lie by one against many, although the claims be separate and may have arisen at different times, if such claims present a question common to all and where the same character of relief may be granted as against all (Pomeroy's Eq. Jur. 2nd Ed. Vol. I. Sec. 274.)

This course was followed by the Receiver of a National Bank against the stockholders, where the Court held that to sustain such suit a community of interest was not necessary, but only a common question of law.

Bailey vs. *Tillinghast,* 40 C. C. A. 93.

II.

THE ACT OF 1885 PROVIDING A DIFFERENT BASIS OF VALUATION AND DIFFERENT WATER RATES FROM THOSE RELIED ON BY COMPLAINANT AS PROVIDED BY THE ACT OF 1862, DOES NOT VIOLATE SECTION 10 OF ARTICLE 1 OF THE CONSTITUTION OF THE UNITED STATES AS TO THE IMPAIRMENT OF THE OBLIGATION OF CONTRACTS.

Complainant alleges in its bill of complaint that, it was incorporated in September, 1871, under the acts of April 14th, 1853 (the then general incorporation law), and also under the amendatory act of May 14th, 1862 (Rec. 1).

The Act of 1853 was a general Act authorizing the organization of corporations "for the purpose of engaging in any species of trade or commerce," but it did not undertake to provide for the regulation or fixing of rates to be charged by corporations engaged in the business of selling water. It, however, authorized the corporation "to purchase, hold, sell "and convey such real and personal estate as the "purposes of incorporation shall require."

Under this general incorporation Act of 1853, complainant, *irrespective of the Act of 1862,* had the right to engage in the business of acquiring, furnishing and selling water.

Heyneman vs. *Blake,* 19 Cal. p. 594.

The Act of 1862 is hereinbefore printed in full in this brief. By Section 3 of that Act, it is provided that the rates of a canal and irrigation company might be regulated "by the Board of Supervisors "of the County or Counties in which the work is "situated, but which shall not be reduced by the Su- "pervisors so low as to yield to the stockholders less "than *one and one-half per cent. per year upon the "capital actually invested."* (*Italics ours.*) As will be seen from reading it, this Act of 1862 is extremely crude, failing to provide for any notice to the Water Company or to the rate payers, or as to how long the rates so fixed shall be enforced, or for new rates.

In 1880, the Legislature of California, passed a much more comprehensive Act covering this matter and by which the Boards of Supervisors of the counties were required to fix each year the "maximum rates" at which water should be sold for irrigation, but no maximum or minimum rates were specified, nor was any basis of valuation provided by that Act (Stats. 1880, p. 59).

In 1885 was enacted the Act under which the Supervisors of Stanislaus County fixed the water rates in controversy in this suit. (That Act is hereinbefore printed in full in this brief before the argument.) This Act of 1885 is far more complete in its provisions than any of the former acts. It provides for the initiation of proceedings before the Board of Supervisors to fix rates by the petition of twenty-five taxpayers; that there shall be regular notice and hearing; that the rates shall be fixed upon the value of the property used and useful in supplying water; that such rates shall not be "less than six nor more than eighteen per cent. upon said value;" that the Water Company, or rate-payers, may petition that, at the end of a year, the old rate be set aside and new rates be fixed; that the rate-payers can recover damages from the Water Company if it does not furnish water at the rates fixed, and that the Water Company shall have the right of eminent domain.

Obviously, this Act of 1885, was intended to supercede these prior acts, and while it does not expressly

in terms repeal them, nevertheless it is so clearly repugnant to the Act of 1862, especially as to the per cent. of rates and the basis of valuation in determining those rates, that the Act of 1862, as to those matters cannot stand, but is in law repealed on the ground that such provisions in the Act of 1885 are wholly inconsistent with and repugnant to the provisions as to the same matters in the Act of 1862.

Miller vs. *Curry*, 113 Cal. 644.
Dillon vs. *Bicknell*, 116 Cal. 111.

Accordingly, complainant during the trial of this suit, amended its bill of complaint with the allegations that it had, prior to the passage of the Act of 1885, invested $971,113.13 in its works, and that if the Act of 1885 repealed the Act of 1862, it impaired the alleged contract between complainant and the State of California under the Act of 1862, as to rates and basis of valuation, and, therefore, violated Section 10 of Article 1 of the Constitution of the United States.

1. THE ACT OF 1862 RELIED ON BY COMPLAINANT AS CONSTITUTING A CONTRACT BETWEEN IT AND THE STATE WAS AND IS UNCONSTITUTIONAL AND VOID, IN THAT, IT WAS A SPECIAL AND LOCAL ACT EXCEPTING ELEVEN COUNTIES FROM ITS OPERATION, AND THEREFORE IN VIOLATION OF SECTION 31 OF ARTICLE IV OF THE CONSTITUTION OF CALIFORNIA OF 1849.

When complainant was incorporated in 1871, and when the Act of 1862 was passed, the Constitution of the State of California in force was that adopted in 1849, and the same continued in force until the adoption in 1879 of the present Constitution of that State.

Section 31 of Article IV of the Constitution of 1849, provided, that "Corporations may be formed "under *general laws,* but shall not be created by "*special Act,* except for municipal purposes. All "general laws and special acts passed pursuant to "this section may be altered from time to time or re-"pealed." (*Italics ours.*) Section 11 of Article I of the same Constitution provided that "all laws of a general nature shall have a uniform operation."

Now, it is expressly provided by Section 5 of this Act of 1862, that "the provisions of this Act *shall not* "*apply* to the Counties of Nevada, Placer, Amador, "Sierra, Klamath, Del Norte, Trinity, Butte, Plu-"mas, Calaveras and Tuloumne." (*Italics ours.*) In other words, irrigation companies might operate in these eleven counties without having their rates subject to regulation by the State through the Boards of Supervisors, while they would be subject to such regulation in all other counties of the State. There were, when this Act was passed, at least sixty counties in the State of California. It is difficult to conceive of legislation more vicious in character than this. While it is true that, in general, special legis-

lation was not prohibited by the Constitution of 1849, nevertheless, it was, as we have seen, expressly prohibited as to corporations other than municipal, and the Courts of California strictly enforced the Constitutional inhibition in that regard.

In *San Francisco* vs. *Spring Valley Water Works,* 48 Cal. 493, the defendant company had been incorporated in 1857, under the general incorporation Acts of 1853 and 1855, to introduce water into the City of San Francisco (p. 495). On the 23rd day of April, 1858, the Legislature passed an Act applicable and limited to said Water Company *only,* granting certain franchises, and, among others, providing that the water rates to be fixed "shall not be so low "as to yield less than twenty per cent. per annum "on the actual capital invested in said works." The Supreme Court of California in two elaborate opinions (the last one on re-hearing), decided the Act in question to be unconstitutional because in violation of the provision against special legislation as to corporations. The decision on this point was aptly summarized by McKinstry, Justice, in his concurring opinion as follows: "The Legislature could "neither confer a benefit nor impose an obligation "on the Spring Valley Water Works not conferred "or imposed on all the water companies by the gen- "eral law. To confer a special benefit or impose a "special obligation would be equally destructive of "the uniformity which it is the object of Section

"31, of Article IV of the Constitution to secure."

The Court, in the case last cited, also reversed the decision in *California S. T. Co.* vs. *Alta Tel. Co.*, 22 Cal. 398 (pp. 515-523).

In *Waterloo T. P. R. Co.* vs. *Cole*, 51 Cal. 381, plaintiff, a turnpike road company, was incorporated in 1869, to construct a road in the County of San Joaquin. In 1867 (Stats. 1867-8, p. 169) the Legislature had passed an Act authorizing the Supervisors of San Joaquin County to grant certain franchises and privileges to and impose certain obligations upon turnpike corporations, and among others, the franchise to collect tolls not to exceed twelve per cent. per annum on the amount expended. The Court held that the act was in violation of the foregoing constitutional provision against special legislation to corporations; the Court saying as to the Act in question, "The last named Act, in so far as it au-
"thorizes the Board of Supervisors to grant to a
"turnpike corporation franchises to be enjoyed and
"exercised within that County, *which are not com-*
"mon to all other similar corporations under the
"general law, is unconstitutional and void. (*San*
"Francisco vs. *Spring Valley Water Works*, 48 Cal.
"493). The Act is obnoxious to several objections,
"on this ground: It requires the Board of Super-
"visors to authorize the corporation to collect such
"tolls as will produce a net revenue not exceeding
"twelve per cent. per annum on the amount expend-

"ed; limits the franchise to twenty years, at the end "of which term the road is to be surrendered to the "County, in good repair, and in the meantime the "County may purchase it at cost, less the net amount "received for tolls. *Under the general law there "are no such conditions applicable to turnpike road "corporations generally, and none such can be estab- "lished under our Constitution by special Act ap- "plicable to only a portion or a particular class of "such corporations.* The act is, therefore void, in "so far as it attempts to confer upon corporations "new or peculiar franchises, or impose upon them "additional obligations not applicable to all other "similar corporations formed under the general "law." (*Italics ours.*) This decision is especially in point here, since the ground of the Court's decision was that the Constitutional provision had been violated in confining the franchise as to tolls and other privileges and obligations to turnpike corporations operating in San Joaquin County, whereas such corporations in other counties of the State were not given such franchises nor subjected to such obligations. In other words, the Act was special because local, confined in its operation to one County, and not general throughout the State, so as to apply to all turnpike corporations in the State.

The foregoing two decisions of the Supreme Court of California have been repeatedly re-affirmed by

that Court in many subsequent cases, among them we cite:

Spring Valley W. W. vs. *Bryant*, 52 Cal. p. 140.
Omnibus Ry. Co. vs. *Baldwin*, 57 Cal. p. 164.
Home etc., vs. *Reis*, 95 Cal. p. 150.

In *School District* vs. *Insurance Co.*, 103 U. S. 707, this Court held an Act of the Legislature of Nebraska, authorizing a particular School District to issue bonds, to be void because violative of Section 1 of Article 8 of the Constitution of that State, which declared that "the Legislature shall pass no special Act conferring corporate powers."

The conclusion that the Act of 1862, is unconstitutional, cannot be avoided by the claim that the Legislature had a right to classify irrigation corporations operating in all parts of the State other than in the eleven excepted Counties, as constituting a distinct class. Under no theory can such classification be justified. Under no legally accepted theory of classification can such discrimination be justified. It is settled in California that the Legislature may classify corporations with reference to their character and purpose and legislate for each class separately, such as for banking, railroads, insurance and other kinds of corporations too numerous to mention, but it never has been decided by the Supreme Court of California that the Legislature, under its power

to classify, can limit the operation of a law relating to any class of private or quasi-public corporations to any particular counties or part of the State. It may be contended by counsel that the eleven counties excepted from the operation of this Act were essentially mining counties and that the Legislature, in its wisdom, determined that it was not advisable to regulate the water rates of miners' water ditches. Even should such have been the reason it could not avail against the constitutional provisions cited; but the fact is, that, in addition to these eleven excepted counties, there were then in California many other mining counties containing miners' water ditches, such as El Dorado, Siskiyou, Yuba and Shasta. Why were they not also excepted? It is common knowledge that, from the earliest days in California, water has been conveyed in ditches and canals and sold for mining purposes, but also for irrigating land, for watering stock, and for domestic purposes in all parts of and in every county in the State. It cannot be claimed that the discrimination in this Act was because canals for transporting passengers and freight could not well be constructed in the eleven excepted counties, for even had such then been the fact (which it was not), it would obviously have been unnecessary to make the exception in the statute. But furthermore, as to this, under Section 1 of the Act of 1862, the incorporations thereunder could be for "the construction of canals for the transportation of

"passengers and freights, *or* for the purpose of irri-
"gation *or* water power, *or* for the conveyance of
"water for mining, *or* manufacturing purposes, *or*
"for all of such purposes." (*Italics ours.*) According to its bill of complaint, complainant is engaged solely in the business of "appropriating water for irrigation, sale, rental and distribution for hire" (Rec., 2), and has never, so far as this record discloses, operated its so-called canal for any other purpose.

So far as we have been able to discover, the question of the unconstitutionality of this Act of 1862 has never been raised in or decided by any Court of the State of California, but we contend, under the Californian cases cited, that the Act is clearly unconstitutional. No Board of Supervisors in the State, so far as we have been able to discover, ever assumed to regulate water rates under this Act of 1862, and ever since its passage it has been dead and buried, both in law and in fact, until now, after forty years, it is resurrected by complainant.

As before stated, a holding by this Court that the Act of 1862 is unconstitutional, would not affect the incorporation or business of complainant in regard to acquiring and selling water under the said Act of 1853 (*Heyneman* vs. *Blake,* 19 Cal., p. 594), and it also has such rights, as well as the right of eminent domain under the said Act of 1885.

2. EVEN SHOULD THE ACT OF 1862 BE CONSTITUTIONAL, YET THE WATER RATES AND BASIS FOR FIXING THEM, THEREIN PROVIDED FOR, DID NOT CONSTITUTE AN UNALTERABLE CONTRACT WITH COMPLAINANT, BUT WERE MATTERS OF REGULATION OF A PUBLIC USE SUBJECT TO THE ALTERATIONS MADE BY THE ACT OF 1885, UNDER THE POWER RESERVED TO THE STATE OF CALIFORNIA IN EACH OF ITS CONSTITUTIONS TO ALTER FROM TIME TO TIME OR REPEAL LAWS RELATING TO CORPORATIONS. THE PROVISIONS OF THE ACT OF 1885 ARE REASONABLE AND NOT OPPRESSIVE, AND THE CIRCUIT COURT ERRED IN DECIDING THAT THERE WAS SUCH UNALTERABLE CONTRACT UNDER THE ACT OF 1862 AS TO THE BASIS OF VALUATION OF COMPLAINANT'S WORKS.

Section 31 of Article IV of the Constitution of 1849 provides that "corporations may be formed "under general laws, but shall not be created by "special act, except for municipal purposes. All "general laws and special acts passed pursuant to "this section *may be altered from time to time or re-"pealed."* (*Italics ours.*)

Section 1 of Article XII of the Constitution of 1879 provides, "corporations may be formed under "general laws, but shall not be created by special act. "All laws now in force in this State concerning cor-"porations, and all laws that may hereafter be passed "pursuant to this section, *may be altered from time "to time or repealed."* (*Italics ours.*)

It is provided by Section 1 of Article XIV of the Constitution of 1879 of California that "the use of "all water now appropriated, or that may hereafter "be appropriated, for sale, rental or distribution, is "hereby declared to be a public use, and subject to "the regulation and control of the State, in the man-"ner to be prescribed by law."

Section 2 of the same Article of said Constitution provides: "The right to collect rates or compensa-"tion for the use of water supplied to any county, "city and county, or town, or the inhabitants thereof, "is a franchise, and cannot be exercised except by "authority of and in the manner prescribed by law."

The said Act of 1885 provides in Section 1: "The "use of all water now appropriated, or that may "hereafter be appropriated, for irrigation, sale, ren-"tal or distribution, is a public use, and the right to "collect rates or compensation for use of said water "is a franchise, and except when so furnished to any "city, city and county, or town, or the inhabitants "thereof, shall be regulated and controlled in the "counties of this State by the several Boards of Su-"pervisors thereof, in the manner prescribed in this "Act."

As before seen, the material differences between the Acts of 1862 and 1885 are that, by the Act of 1862, the Supervisors' rates must give the stockholders *not less than eighteen per cent* per annum upon the *capital actually invested,* while under the Act of

1885 the rates must give a profit not less than *six per cent* per annum upon the *value of the properties used and useful in the appropriation and furnishing of water.* It is also provided in the Act of 1885 (Section 5) that, in fixing the rates, the Supervisors "may "likewise take into estimation any and all other facts, "circumstances and conditions pertinent thereto, to "the end and purpose that the rates shall be equal, "reasonable and just both to * * * such cor- "porations and to said inhabitants."

Under this provision the Supervisors could consider the cost of the works in arriving at their value.

The question here presented as to whether or not complainant has an unalterable contract with the State entitling it to have its rates regulated by the Supervisors so that its net profits shall not be less than eighteen per cent per annum upon the capital invested, is one of the main points in this case, since complainant persistently urged, and since the learned Circuit Judge in his opinion in this case held, that the cost of the works was in the chief basis upon which they should be valued by the Supervisors in arriving at the rates to be fixed. We furthermore say that such is one of the main points in this case, because we think we can hereinafter make it clear to the Court that the rates complained of were fair and reasonable upon a fair valuation of the works and considering the service rendered.

This Court has uniformly held that, where at the time a corporation exercising a public use takes its charter and franchises, there exists a provision in the Constitution or other law of the State reserving to the State the right to alter, amend or repeal such charter or the laws under which it was incorporated, that, in such case, the charter and franchises must be construed as having been granted by the State and accepted by the corporation on the express condition that they may be altered, amended or repealed by the State. The only qualification of, or limitation to this rule is, as has been said in *Shields* vs. *Ohio,* 95 U. S., 319, and in other cases, that such "alterations "must be reasonable; they must be made in good "faith, and be sustained within the scope and object "of the act of incorporation. Sheer oppression and "wrong cannot be inflicted upon the guise of amend-"ment or alteration" (p. 324). We do not contend for anything to the contrary in this case. There is nothing in this Act of 1862 making it in any sense or degree a specific contract by the State with complainant that the latter should, for the period of its existence, or for any time, have the unalterable right to have its rates regulated by the State as therein provided. This Act must be read as though the then constitutional provision reserving the State's right to alter or amend or repeal it was a part of it.

The matter of regulation, as between complainant and the public, of the sale by the former of the ap-

propriated public waters of the State, was a right so inherent in the sovereignty of the State that it might well be claimed (if it were here necessary to do so) that the Legislature under the Constitution had no power to pass an Act that would contract away from the State the right to such regulation.

In *Fallbrook Irrigation District* vs. *Bradley,* 164 U. S., 112, this Court, by reason of the scarcity of water and the great public necessity for irrigation in California, sustained to an extreme limit the power of the State to regulate irrigation therein. So that all this Court has decided and said with reference to the right of a State under its reserved constitutional power to reasonably alter and amend statutory, or other regulations of railroad rates and turnpike tolls, and as to exemptions from taxation and as to the regulation of the exercise by private or by quasi-public corporations of public utilities, apply with special force to this case.

In *Covington* vs. *Kentucky,* 173 U. S., 231, it appeared that the Legislature of Kentucky passed an Act, in 1886, authorizing the City of Covington to construct a system of water works with the provision that they "shall be and remain forever exempt from State, county and city tax."

At the time of the passage of that Act there was a general statute in force in Kentucky, passed in 1856, providing that "all charters and grants of or to cor-
" porations, or amendments thereof, and all other

"statutes, shall be subject to amendments or repeal "at the will of the Legislature, unless a contrary in- "tent be therein plainly expressed."

In 1891 the State of Kentucky adopted a new Constitution requiring all such property as the water works of the City of Covington to be taxed.

Under the Act of 1886 the City of Covington bought lands, built reservoirs, laid pipes and completed a system of water works, and invested a large amount of money under the provisions of the Act.

In 1895, certain lands acquired by the city, under the Act of 1886, constituting a part of its water works, were assessed for State and county taxes. The city refused to pay such taxes, claiming exemption under the Act of 1886, under which it had invested its money in construction, and claiming that the State had contracted with it by that Act not to tax its water works property.

In deciding the case this Court, through Mr. Justice Harlan, said: "The fundamental question in "the case, then, is whether, at the time of the adop- "tion of that Constitution, the City of Covington had, "in respect of the lands in question, any contract "with the State, the obligation of which could not "be impaired by any subsequent statute or by the "present Constitution of Kentucky, adopted in 1891. "If the exemption found in the Act of 1886 was such "a contract, then it could not be affected by that

" Constitution any more than by a legislative enact-
" ment.

"We are of the opinion that the exemption from
" taxation embodied in that Act did not *'tie the*
" *hands'* of the Commonwealth of Kentucky so that
" it could not, by legislation, *withdraw such exemp-*
" *tion* and subject the property in question to taxa-
" tion. The Act of 1886 was passed subject to the
" provision in the general statute of Kentucky above
" referred to, that all statutes 'shall be subject to
" 'amendment or repeal at the will of the Legislature
" 'unless a contrary intent be therein plainly ex-
" 'pressed.' If that Act in any sense constituted a
" contract between the City and the Commonwealth,
" the reservation in an existing general statute of the
" right to amend or repeal it, was itself a part of that
" contract. *Griffith* vs. *Kentucky Ins. Co.,* 3 Bush.
" 592.

"The City accepted the Act of 1886, and acquired
" under it the property taxed subject to that reserva-
" tion. There was in that Act no *'plainly expressed'*
" *intent never to amend or to repeal it.* It is true that
" the Legislature said that the reservoirs, machinery,
" pipes, mains and appurtenances, with the land upon
" which they were situated, should be forever exempt
" from State, county and city taxes. But such pro-
" vision falls far short of a plain expression by the
" Legislature that at no time would it exercise the
" reserved power of amending or repealing the Act

"under which the property was acquired. The ut-
"most that can be said is that it may be inferred, by
"the terms in which the exemption was declared,
"that the Legislature had no purpose at the time the
"Act of 1886 was passed to withdraw the exemption
"from taxation; *not that the power reserved would*
"never be exerted, so far as taxation was concerned,
"if in the judgment of the Legislature the public in-
"terests required that to be done. The power ex-
"pressly reserved to amend or repeal a statute should
"not be frittered away by any construction of subse-
"quent statutes based upon mere inferences." (p.
238.) (*Italics ours.*)

In *Peik* vs. *Chicago & Northwestern Railway Company*, 94 U. S., 164, the Railroad Company, by its charter was authorized "to demand and receive
"such sum or sums of money for the transportation
"of persons and property and for storage of prop-
"erty as it shall deem reasonable."

The Constitution of Wisconsin in force when the charters were granted provided: "That all acts for
"the creation of corporations within the State 'may
"'be altered or repealed by the Legislature at any
"'time after their passage.'"

Under this power reserved to the State in its Constitution, it was held that the Legislature had power to prescribe a maximum of charges to be made by said company for transporting persons or property within the State.

Shields vs. *Ohio*. 95 U. S., 319, was another case in which this Court held that the Legislature of Ohio had a right, under the power reserved in the Constitution of that State, to alter a statute allowing a railroad company to charge such tolls as it might deem reasonable. Such alteration consisted in providing that the railroad could not charge exceeding three cents per mile for carrying passengers more than eight miles, Mr. Justice Swayne saying: "It is urged "that the franchise here in question was property "held by a vested right, and that its sanctity, as such, "could not thus be invaded. The answer is *concensus "facit jus*. It was according to the agreement of the "parties. *The company took the franchise subject "expressly to the power of alteration or repeal by "the General Assembly*. There is, therefore, no "ground for just complaint against the State." (p. 324.) (*Italics ours.*)

In *Spring Valley Water Works* vs. *Schottler,* 110 U. S., 347. it was decided that. under the reserved power contained in Article IV, Section 31. of the Constitution of California, adopted in 1849, the people, in the new Constitution of 1879, had the right to change the manner provided by the Act of 1858 of appointing the Board of Commissioners whose duty it was to fix the water rates as between the Water Company and the City of San Francisco, and it was said by Mr. Chief Justice Waite: "The Con- "stitution of California adopted in 1849 *prohibited*

"*one Legislature from bargaining away the power* "*of succeeding Legislatures to control the adminis-* "*tration of affairs of a private corporation formed* "*under the laws of the State.* Of this legislative dis- "ability the Spring Valley Water Company had no- "tice when it accepted the privileges of the Act of "1858, and it cannot be presumed to have built its "works and expended its moneys in the hope that "neither a succeeding Legislature, nor the people in "their collective capacity when forming the Consti- "tution, would ever deem it expedient to return to "the old mode of fixing rates, rather than to any want "of power to do so if found desirable." (p. 355.) (*Italics ours.*)

While it is true that this case is not one involving a change of rate, nevertheless it decides the principle we contend for. When this case, last cited, was decided by the Supreme Court of California (61 Cal., 3), that Court said as to the rights of the State under its power reserved in the Constitution of 1849: "The water which it (the Water Company) is en- "gaged as a business in selling to the public is re- "garded and protected by law as its property; but, "as property, *which has been devoted to the use of* "*the public, it is subject to the regulation and con-* "*trol of the State;* and the State, while it has sanc- "tioned the use, has a duty to discharge to the public "by regulating the use, as well as the powers and "privileges of the corporation incidental to the use.

"These things *are not of the contract;* they appertain "to the sovereignty of the State, and *cannot be bar-* "*gained away.*" (*Italics ours.*) (p. 8.)

In *Georgia Railroad & Banking Co.* vs. *Smith,* 128 U. S. 174, the State statute incorporating the Railroad Company gave the exclusive right for a railroad between certain places, and also provided that the charge of transportation should not exceed 50 cents per 100 pounds on heavy articles, and 10 cents per cubic foot on articles of measurement for every 100 miles, and 5 cents per mile for every passenger. It was claimed by the Railroad Company that such provisions as to rates constituted a grant of right to charge the same, and that such grant was an unalterable contract between it and the State of Georgia. Said statute was enacted in 1835. The constitution of Georgia of 1877, vested in the General Assembly of that State the power to regulate "Railroad freights and passenger tariffs" so as to prevent unjust discriminations and require reasonable and just rates.

In 1879, an act was passed by the Legislature appointing Railroad Commissioners, and authorizing them to prescribe the rates of fare for the carriage of persons and merchandise to be charged by railroads within the State. This Commission prescribed certain rates less than those claimed by the Railroad Company under said Act of 1835. This Court decided that the State could so alter the rates and fares

to be charged by the Railroad Company, Mr. Justice Field, who delivered the opinion of the Court, saying with reference to this statute:

"*It contains no stipulation, nor is any implied, as "to any future action of the Legislature.* If the ex- "clusive right remain undisturbed, there could be no "just ground of complaint that other limitations than "those expressed are placed upon the charges autho- "rized. It would require much clearer language "than this to justify us in holding that, notwith- "standing any altered conditions of the country in "the future, the Legislature had, in 1833, contracted, "that the Company might, for all time, charge rates "for transportation of persons and property over its "line up to the limits there designated." (p, 181,) (*Italics ours,*)

In *Hamilton Gas Light Company* vs. *Hamilton City,* 146 U. S. 258, it was said by Mr. Justice Harlan, delivering the opinion of the Court,

"The legislative grant to a corporation of special "privileges, if not forbidden by the constitution, may "be a contract; but where one of the conditions of the "grant is that the Legislature may alter or revoke it, "the law altering or revoking, or changes the effect "to alter or revoke, the exclusive character of such "privileges, cannot be regarded as one impairing the "obligation of the contract, whatever may be the mo- "tive of the Legislature, or however harshly such

"Legislature may operate, in the particular case, up-
"on the corporation or parties affected by it. *The*
"corporation, by accepting the grant subject to the
"legislative power so reserved by the constitution,
"must be held to have assented to such reservation."
(*Italics ours.*) (p. 270.)

In *Reagan* vs. *Mercantile Trust Co.*, 154 U. S., at page 417, Mr. Justice Brewer, delivering the opinion of the Court, says: "We are of opinion that the "Texas & Pacific Railway Company is, as to busi-
"ness done wholly within the State, subject to the "control of the State in all *matters of taxation, rates,*
"and other police regulations." (*Italics ours.*)

In *Covington & Lexington Turnpike Road Co.* vs. *Sanford*, 164 U. S. 578, it was provided by the State statute incorporating the original turnpike company in 1834, that the Legislature could reduce the tolls so that the Company should earn on the amount expended upon the road and repairs not more than 14 per cent. per annum. Subsequently, by the statute of 1851, two new corporations were formed out of the original one, and the act incorporating them provided that each of the new companies was to possess and retain. "All the powers, rights and capacities "in severalty granted by the act of incorporation and "the amendments thereto to the original company."

In 1865 and in 1890, statutes were passed largely reducing the tolls collected by one of these com-

panies. This Court decided that, notwithstanding the provisions of the Act of 1851, the exemptions and privileges as to tolls under the Act of 1834, did not extend to the two new companies, saying: "In a "recent case, *Norfolk & Western Railroad* vs. "*Pendleton.* 156 U. S. 667, 673, we had occasion "to say, in harmony with repeated decisions, that 'in "'the absence of express statutory direction, or an "'equivalent implication by necessary construction, "'provisions, in restriction of the right of the State to "'tax the property or to regulate the affairs of its cor- "'porations, do not pass to new corporations, succeed- "'ing, by consolidation or by purchase under foreclos- "'ure, to the property and ordinary franchises of the "'first grantee'; and that this was a 'salutary rule of "'interpretation, founded upon obvious public policy, "'which regards such exemptions as in derogation of "'the sovereign authority and of common right, and "'therefore not to be extended beyond the exact and "'express requirements of the grant construed *stricti-* "*'simi juris. Morgan* vs. *Louisiana,* 93 U. S. 217; "*'Wilson* vs. *Gaines,* 103 U. S., 217; *Chesepeake &* "*'Ohio Railway* vs. *Miller,* 114 U. S., 176.' The "same principles should be recognized when the "claim of immunity or exemption from legislative "control of tolls to be exacted by a corporation es- "tablished by authority of law for the construction "of a public highway. *It is of the highest import-* "*ance that such control should remain with the State*

" *and it should never be implied that the Legislature* " *had intended to surrender it. Such an intention is* " *not to be imputed to the Legislature if it be possible* " *to avoid doing so by any reasonable interpretation* " *of its statutes. It is as vital that the State should* " *retain its control of tolls upon public highways as it* " *is that it should not surrender or fetter its power of* " *taxation.* * * * It is settled law that in grants " by the public *nothing passes merely by implication;* " and if a contract with a State, relating to the exer- " cise of franchises, is susceptible of two meanings, " 'the one restricting and the other extending the " 'powers of a corporation, that construction is to be " 'adopted which works the least harm to the State.' " The *Binghampton Bridges,* 3 Wall., 51, 75; *Rug-* " *gles* vs. *Illinois,* 108 U. S. 526; *Stein* vs. *Bienville* " *Water Supply Co.,* 141 U. S. 67, 80, 81." (*Italics ours.*) (pp. 587-8.)

When the Act of 1834, referred to in the foregoing case was passed, there was not, it appears, any provision in the then constitution of the State of Kentucky reserving the power to alter and repeal charters of corporations or statutes relating thereto, and consequently what was said by the Court in that case in the absence of any constitutional reservation is a strong statement of the principle involved in the case at bar where there was such constitutional reservation.

In *Sioux City Street Railway Co.* vs. *Sioux City,*

138 U. S. 98, the facts were that, on December 12th, 1883. the City of Sioux City, in the State of Iowa, by ordinance, conferred on the Street Railway Co., incorporated December 6th, 1883, under the general laws of said State, the right of operating a street railway, with the requirements that it should pave the street between the rails. Subsequently, under an Act of 1884, the City, by ordinance, required the Company also to pave the street for one foot outside of the rails, and assessed a special tax against it for the paving outside of the rails. Under Section 1090 of the Code of Iowa, which was in force when the Company was incorporated, its franchise was subject to such conditions as the Legislature should thereafter impose as necessary for the public good. It was held by this Court that there was no contract between the Company and the State or the City, the obligation of which was impaired by the burden of the additional paving, Mr. Justice Blatchford delivering the opinion of the Court, saying: *"No question can arise "as to the impairment of the obligation of a contract, "when the company accepted all of its corporate "powers subject to the reserve power of the State to "modify its charter and to impose additional bur-"dens upon the enjoyment of its franchise."* (p. 106.) (*Italics ours.*)

In addition to the foregoing, the following cases also support our contention:

Morris & Essex R. R. Co. vs. *Comrs.*, 37 N. J., 228.

O'Phinney vs. *Trustees*, 42 At. R., 59 (Md.)

Ex parte Kockler, 22 Fed., 529.

St. Louis & S. F. Ry. Co. vs. *Gill*, 54 Ark., 101.

Railway Co. vs. *Ryan*, 56 Ark., 245.

Griffin vs. *Kentucky I. Co.*, 3 Bush, 592.

Watson, etc., vs. *County Court, etc.*, 45 L. R. A., 675 (Mo.)

Gas & Water Co. vs. *Corpn. of Dowington*, 175 Pa. St., 341.

DECISIONS RELIED ON BY COMPLAINANT.

As we have not, as yet, seen complainant's brief to be filed in this case, we can here refer only to such decisions as it relied on in the Circuit Court. An examination of those decisions will show them clearly distinguishable from those relied upon by us in the essential particulars that, in all of them the properties or rights protected by the courts from impairment, alteration or destruction were held either under grants in fee or under statutes or ordinances amounting to specific contracts, or that it was sought to take private property without compensation.

As *Detroit* vs. *Detroit Citizens' St. Ry. Co.*, 184 U. S., 368, decided since the trial of this case, will doubtless be cited by complainant, we direct atten-

tion to the fact that the ground of this Court's decision there was the fact that the City Council had authority to and did enter *into a specific agreement* with the street railway.

In *Detroit* vs. *Detroit, etc., P. R. Co.,* 43 Mich., 140, the State attempted to take away the franchise of collecting tolls on two miles of the company's road, and this was held to amount to confiscation of said two miles of the company's road and property.

In *Com'rs* vs. *Green & B. R. N. Co.,* 79 Ky., 73, the corporation had an express contract with the State for the improvement of certain rivers, and it had expended large sums of money under the contract. The corporation had also leased the rivers from the State for thirty years. It was decided that such contract and lease could not be cancelled by the State by subsequent legislation without compensation.

In *Miller* vs. *New York & Erie R. R. Co.,* 21 Barb., 513, the point decided was that, the State could not, without making compensation therefor, compel the railroad company, at its own expense, to build a highway over and across private lands belonging to the company.

Commonwealth vs. *Essex Co.,* 13 Gray, 239, is to the same effect as to burdensome regulations regarding fishways.

In *Re Parrott,* 1 Fed. Rep., 481, the only point decided was that a statute prohibiting corporations from employing Chinese was an unreasonable and,

therefore, a void amendment to the general incorporation law of California.

In *People* vs. *O'Brien,* 111 N. Y., 1, it was decided that, although the State might dissolve the corporation, yet it could not, upon such dissolution, arbitrarily and without making compensation, take away from it and its creditors and vest in the State or its donees certain of its franchises and properties that survived such dissolution.

The case of *Ball* vs. *Rutland R. Co.,* 93 Fed. Rep., 513, is apparently greatly relied on by complainant. It there appears that the State of Vermont had granted to the predecessor of the defendant company "the right to receive and collect tolls or compensa- "tion at such rates as the directors may from time to "time prescribe and establish, for the conveyance "and transportation of all passengers and freight "over their road, or any part thereof, 'which the "Supreme Court may alter,' for a term of not ex- "ceeding ten years at any one time, as said Court "may judge reasonable, and in such manner that the "income of said company shall not be reduced below "twelve per cent per annum on the amount of the "capital stock, after deducting all expenses." The road was built 119 miles long under this charter, which was perpetual, *and not made subject to amendment or repeal.* The road was twice mortgaged and was operated for years under the charter. Afterwards the road passed into the hands of the defend-

ant, Rutland Railroad Company. The Circuit Court decided only that the law under which the charter was granted would apply to the defendants in the same manner as to their predecessor.

The Court did not even go so far as to hold that, where no reservation of amendment or repeal existed as to the charter, the State would not have the sovereign right to fix and regulate rates of charges so that they might be reasonable and just.

The Court says (page 516): "Question is also "made whether this franchise for taking tolls and "fares has passed to the Rutland Railroad Com- "pany, and is so held now as not to be subject to leg- "islation. It was the most important corporate right "from the beginning; was covered by the mortgages, "the first of which went into preferred stock, such "as is held by the orators; and was a part of what the "Act of Incorporation of the Rutland Railroad "Company (Section 7) authorized it to obtain, and "of which, pursuant thereto, took conveyance. The "Act was, by Section 12, made subject to the action "of any future legislation to amend, alter or repeal, "as the public good might require; and this provi- "sion is much relied upon as authorizing this leg- "lation. *But this franchise existed before that Act,* "and if the whole Act should be repealed, the fran- "chise would remain, as the road itself would, and "belong to the orators and others, where the repeal

"of the Act would leave it; and it would be as much "outside of impairment as before. If this were not "so, the Rutland Railroad Company would still have "the right to operate its road and to take reasonable "fares and tolls for profit; and while the Legisla- "ture has the *right to regulate,* and within proper "bounds to limit them, it does not appear to have the "right to destroy or take away such reasonable "profits as may be earned by the corporation for the "benefit of its stockholders." (Citing *Chicago M. & St. P. Ry. Co.* vs. *Minnesota,* 134 U. S., 418; *Reagan* vs. *Trust Co.,* 154 U. S., 362; and *Smyth* vs. *Ames,* 169 U. S., 466.) (*Italics ours.*)

The charter of the predecessor of defendant in that case provided that "the income of the company shall "not be reduced below twelve per cent per annum "on the amount of its capital stock, after deducting "all expenses," and *there was no reservation in the constitution, general laws or the charter of the original company, at the time of its incorporation, of the power in the State to amend or repeal.* The case does not intimate that, had such reservation existed, the State by proper legislation would not have had the right to fix and regulate the rates of charges so that the income of the company might have been reduced below twelve per cent upon the amount of its capital stock; in fact, the inference is that such action by the State would have been legal and constitutional.

The cases of *Orr* vs. *Bracken Co.*, 81 Ky., 593, and *Ohio* vs. *Neff*, 52 Ohio State, 375, simply decided that the reservation, in the charter of a private corporation, of the right of amendment, "does not con- "fer the *power to take away from the corporators* "*the control of the corporate property,* or change "the object of the charter by taking from those hav- "ing a right to select their officers under the charter, "that right, and placing it in the hands of those "whose stock, by reason of the increased power con- "ferred by the amendment, are enabled to control "the corporation." (*Orr* vs. *Bracken Co.*, p. 596.)

Lathrop vs. *Stedman.* Federal case No. 8519, simply reiterates the doctrine, not disputed by us, that the power of the Legislature, as the Court there says, "is not unlimited, for the private rights of persons "are not subject to an unjust and despotic exercise "of power by a Legislature, without means of re- "dress."

Hill vs. *R. R. Co.*, 41 Fed. Rep., 610, decides that "the Legislature had no power to amend the char- "ter of a railroad company so as to direct that the "proceeds arising from the lease or sale of the road "shall, after paying the corporate debts, be applied "in payment of municipal bonds given in exchange "for corporate stock issued to the municipality." We do not perceive the application of this case to the question here, since its decision is simply to the effect

that the Legislature cannot usurp the functions of a court in winding up the affairs of the corporation.

Johnson vs. *Goodyear Mining Co.*, 127 Cal., 4, decided only that the Legislature of California could not, under the reserved power to amend the charters of corporations, enact a grossly discriminating statute giving laborers of corporations certain liens on the corporate property, such liens not being applicable to the property of persons not corporations.

In *Lake Shore, etc., Ry. Co.* vs. *Smith*, 173 U. S., 684, the only point decided by this Court was that, the power of a State to fix maximum rates and charges for the transportation of persons and property by railroad companies did not include the power to fix a rate so as *to discriminate and make an exception in favor of a certain class of persons* and give to them a right of transportation for a less sum than the general rate provided by law. (p. 690.)

It thus appears from an examination and critical comparison of the decisions of the courts upon this subject that, wherever the State had reserved the power to alter, amend or repeal the charter of a corporation, exercising public uses, or the laws under which it was incorporated, it has the right to subsequently regulate in a reasonable manner its charges to the public for services rendered, and that such reserved right of regulation and alteration will never be held to have been impliedly surrendered by the State under such a statute as this Act of 1862, which

contains no provision that could by any possibility be so construed. It may be stated here that complainant's bill of complaint, filed September 29, 1896 (Rec., 9), alleged that it was entitled to have the Supervisors fix the rate so that it would get a reasonable return "upon the value of its canals, etc., "and property actually used and useful in the ap- "propriation and furnishing of water." (Rec., 4, 5, 6.)

This was a clear recognition of the Act of 1885, and it was not until June 8, 1899, nearly three years after the commencement of the suit (Rec., 33, 35, 52), that complainant shifted its position by amending its bill, setting up its alleged unalterable contract as to rates and basis of valuation under the Act of 1862. In short, complainant, for the twenty-eight years following its incorporation, never realized or claimed that it had any such contract under the Act of 1862. As complainant, by the allegations of its bill, had never sought to enforce the rates under the Act of 1862, which were to net it not less than eighteen per cent per annum, and as its average income, even on its own inflated valuation, was about two per cent per annum only (Rec., 4), the Circuit Judge held, in his opinion, that it had never accepted or reduced to possession the grant of rates by the Act of 1862 (Rec., 51). While such appears to have been the opinion of the learned Judge of the Circuit Court as to the *rates* under the Act of 1862, never-

theless it is clear from his opinion that he upheld that Act as constituting a contract with complainant unalterable by the State, in so far as it provided that, the capital invested in the works was *the main thing and basis to be considered in arriving at a valuation of such works.* The learned Judge appears to have arrived at this conclusion because of the mistaken idea that, under the Act of 1885, the Supervisors have no authority to consider the cost of the works in fixing their value (Rec., 42, 43, 44, 45, 46, 47, 48).

3. UNDER THE ACT OF 1885, THE COST OF COMPLAINANT'S WORKS COULD BE CONSIDERED BY THE SUPERVISORS IN DETERMINING THEIR VALUE, AND THE PROVISIONS OF THAT ACT AS TO THE RATES AND BASIS OF VALUATION ARE FAIR AND REASONABLE, AND HAVE BEEN SUSTAINED BY THIS COURT.

Section 5 of that Act provides that "Said Boards "of Supervisors in fixing such rates shall, as near as "may be, so adjust them that the net annual receipts "and profits thereof to the said persons, companies, "associations and corporations so furnishing such "water to such inhabitants shall not be less than six "nor more than eighteen per cent upon the said "value of the canals, ditches, flumes, chutes, and all "other property actually used and useful to the ap- "propriation and furnishing of such water of each "of such persons, companies, associations and cor- "porations; but in estimating such net receipts and

" profits, the cost of any extensions, enlargements, or " other permanent improvements of such water " rights or water works shall not be included as part " of the said expenses of management, repairs and " operating of such works, but when accomplished, " may and shall be included in the present cost and " cash value of such work. In fixing said rates, " within the limits aforesaid, at which water shall " be so furnished as to each of such persons, com- " panies, associations and corporations, each of said " Boards of Supervisors *may likewise take into esti-* " *mation any and all other facts, circumstances and* " *conditions pertinent thereto, to the end and purpose* " *that said rates shall be equal, reasonable and just,* " *both to such persons, companies, associations and* " *corporations, and to said inhabitants.*" (*Italics ours.*)

It is clear under these provisions that, the Supervisors may take into consideration the cost of the works as an element in arriving at their value.

The Act of 1885 was before this Court in the cases of *Osborne* vs. *San Diego Co.,* 178 U. S., p. 39, and *San Diego L. & T. Co.* vs. *Jasper,* 189 U. S., p. 441, and in each, its provisions, both as to rates and as to basis of valuation, was approved by the Court. It is thoroughly settled by this Court by its decisions in the two cases last mentioned, and also in *Smyth* vs. *Ames,* 169 U. S., pp. 544, 546, that while the cost of

the works is an element to be considered, yet that, it is not, as was held by the Circuit Court in this case, the basis or chief element to be considered. According to the decisions, *the value of the property used and useful and the service rendered constitute the basis of valuation in arriving at the rates,* and this is also the rule announced by the Supreme Court of California in *San Diego W. Co.* vs. *San Diego,* 112 Cal., 556, and in *Redlands L. & C. D. Water Co.* vs. *Redlands,* 121 Cal., 212, as to this Act of 1885.

In *San Diego L. & T. Co.* vs. *Jasper, supra,* this Court said (p. 442): "The main object of attack is "the valuation of the plant. It no longer is open to "dispute that under the Constitution 'what the com-"'pany is entitled to demand, in order that it may "'have just compensation, is a fair return upon the "'reasonable value of the property at the time it is "'being used for the public.' *San Diego Land & "Town Co.* vs. *National City,* 174 U. S., 739, 757. "That is decided, and is decided *as against the con-"tention that you are to take the actual cost of the "plant, annual depreciation, etc.,* and to allow a fair "profit on that footing over and above expenses. We "see no reason to doubt that the California statute "means the same thing." (*Italics ours.*)

III.

THE CIRCUIT COURT ERRED IN DECIDING THAT THE BOARD OF SUPERVISORS, IN ARRIVING AT THE VALUE OF COMPLAINANT'S WORKS, DID NOT CONSIDER THEIR COST, SINCE THERE IS NO EVIDENCE WHATEVER IN THIS RECORD THAT IT DID NOT CONSIDER SUCH COST. ON THE CONTRARY, THE EVIDENCE SHOWS THAT THE BOARD MUST HAVE CONSIDERED SUCH COST.

The Judge of the Circuit Court in his opinion, after apparently holding that the cost of complainant's works was the chief element that should have been considered by the Board of Supervisors in fixing the valuation of such works, also expressly stated that the evidence showed that the Board had not, in such matter, considered the cost of the works (Rec., 47, 48, 49, 50). We assert most positively that there was not a particle of evidence introduced on the trial in the Circuit Court supporting this drastic and important statement by the learned Judge. When the fixing of these rates was before the Board of Supervisors for its determination in June, 1896, the petitioning taxpayers were represented by Mr. L. W. Fulkerth and Mr. C. A. Stonesifer, as their counsel, and the complainant by Mr. Garret W. McEnerney, as its counsel, and the following proceedings were had as appears from page 186 to page 247 of the record on this appeal and by stipulations at pages 457, 459 and 460 of the record.

Petitioners introduced in evidence the report of the expert Civil Engineers R. H. Goodwin and E. D. Grove. Goodwin was sworn as a witness and examined and cross-examined most exhaustively with regard to this report. The substance of this report and of Goodwin's testimony was that, the cost of reproducing complainant's works in June, 1896, would be $312,358.00, but that the then cash value was only $251,000.00 (Rec., 188, 189). The expert testified that the reason of this difference was "because "the canal is not in the shape that it would be if it "was built at the present time, on account of the de- "preciation of the lumber and the silting. The canal "is filled up in many places with silt, and that would "have to be taken out, to come to, to meet the orig- "inal lines and the first value" (Rec., 190). This witness, although subjected to a severe cross-examination by counsel for complainant, fully sustained his report and valuation of complainant's works at the sum of $251,000.00. The witness also fully supported his estimate of $13,250 as the annual expense of maintenance and operating the works. The testimony of Goodwin was corroborated by the other expert, E. D. Grove (Rec., 233). The affidavits of Civil Engineers S. F. Taylor, J. H. Bates and George W. Dougherty as to prices of labor and supplies were introduced in evidence by petitioners. They also introduced certified copies of the assessments of complainant's property in Fresno and Mer-

ced counties (Rec., 240). By the stipulation at page 457 of the Record it appears that complainant introduced evidence before the Supervisors "tending " to show the matters tabulated in complainant's Ex- " hibit 2 as modified by Exhibit 12."

Exhibit 2 purports to set forth the original cost of complainant's works, including cost of maintenance, and Exhibit 12 purports to set forth such original cost, less the cost of maintenance (Rec., 145, 401, 445). This was all the testimony, as appears from the record, before the Supervisors. Complainant's showing before that Board consisted solely of statements from its books, going to show the original cost of constructing its works. That character of evidence introduced by it before that Board was presumably no stronger than that of its witness Merritt testifying from the books, as to such cost only, on the trial of this case, and which alleged proofs will be hereinafter more fully commented on. At all events, we see that the petitioners at this hearing before the Supervisors put in evidence, not only as to cost of reproduction, but also as to the then value and as to the expense of maintenance, and that complainant, on the other hand, *relied solely on the alleged original cost of its works,* and insisted that such cost was the value and basis upon which the rates should be fixed. Complainant did not, at that hearing, introduce a single witness or any evidence to contradict the report of said civil engineers or the testi-

mony of Goodwin and Grove in support of their report, nor did it show that the experts' sworn testimony as to the depreciation of the works and as to the filling up of the canal was in any degree untrue, nor did it introduce any evidence that might in any degree have assisted the Supervisors in arriving at the then value of its works, nor did it introduce any evidence to show that its right to appropriate water was of any value, although it alleged in its bill of complaint that the Supervisors had refused to consider the value of such right (Rec., 6.)

It may be here stated that complainant on the trial in the Circuit Court *expressly abandoned the point that its right to appropriate water had a value* (Rec., 303, 304). It was decided by this Court in *San Diego Land Co.* vs. *National City,* 174 U. S., p. 758, that there was no authority for including the value of such water right in the valuation of water works for the purpose of fixing rates. The Board of Supervisors after hearing the foregoing evidence made its order reciting that, after hearing and considering the evidence introduced by petitioners and complainant, it fixed the value of complainant's works at $337,000.00 and its reasonable annual expense of maintenance and operation at $22,000.00 (Rec., 399, 400). It will thus be seen that the *Board accepted neither of the valuations insisted upon before it by the parties respectively;* that it fixed the value at $86,000.00 more than petitioners contended for, and

allowed $8,750.00 more per annum for expenses of maintenance and operation than they contended for. Where is there, we ask, in all this, any evidence whatever that the Supervisors did not consider the cost of complainant's works, or that they acted arbitrarily as charged in the bill? (Rec., 6). On the contrary, the order made shows conclusively that, they must have considered such cost, since the estimates of the expert civil engineers introduced by the petitioners against complainant were so materially raised by the Board's order. Whether this Board was sitting and fixing this valuation in a legislative or judicial capacity is immaterial. It certainly had authority of law to hear and determine this question, and we say that it was no more bound than is a regular Court to specify, in giving its judgment, what evidence it did or did not consider in making up its judgment. If it arrived at a reasonable valuation, the method it may have pursued in making up its decision is immaterial, unless it was guilty of fraud, and no fraud is alleged or proven.

Under the facts here, there can arise not the slightest presumption even, that it did not consider and give due weight to all the evidence before it, including that as to cost of the works as well as that showing their depreciation in value.

In *Spring Valley Water Works Co.* vs. *Schlotter,* 110 U. S., 347, it was said with reference to the action of Boards of Supervisors fixing water rates:

"Like every other tribunal established by the Legis-
"lature for such a purpose, their duties are judicial
"in their nature, and they are bound in morals and
"in law to exercise an honest judgment as to all mat-
"ters submitted for their judicial determination. *It*
"is not to be presumed that they will act otherwise
"than according to this ruling" (p. 354). (*Italics ours.*)

As to complainant's claim that the depreciation of its works should have been included in their cost and valuation, this Court has held directly to the contrary in *San Diego L. & T. Co.* vs. *Jasper,* 189 U. S., p. 446, affirming the ruling on this point in *Redlands L. & C. D. W. Co.* vs. *Redlands,* 121 Cal., 312, 313. Depreciation is covered by the allowance for maintenance.

IV.

COMPLAINANT DID NOT SHOW ON THE TRIAL BY COMPETENT OR SATISFACTORY EVIDENCE THAT THE COST OF ITS WORKS WAS $798,429, AS ALLEGED IN ITS EXHIBIT 12.

For the purpose of proving the cost of its works, complainant caused to be made up from its books of account Exhibit 2, which included the cost of maintenance, and then Exhibit 12, which it claimed excluded the cost of maintenance (Rec., 145, 401, 445). Exhibit 12 is manifestly the only one to be con-

sidered. Prior to the incorporation of complainant in 1871, there appears to have existed complainant's predecessor, the San Joaquin and Kings River Canal Company. (Complainant has same name with word "Irrigation" added.)

As a basis of Exhibits 2 and 12, complainant introduced in evidence the books of account of the San Joaquin & Kings River Canal Company (complainant's predecessor) and also those of complainant. The introduction of these books was objected to by defendants on the grounds that there was no proof that they "contained a true statement of all items of " expense or the items of construction of the original " canal, or that in any respect they are true and cor- " rect and properly kept, *and on the further ground " that they are incompetent*" (Rec., 55-56).

These books were offered in evidence when Mr. Merritt, complainant's secretary, was being examined by complainant as its witness.

As to the books of account of complainant's predecessor, no evidence was offered in support of them to prove that a dollar *had been actually expended* by that company in construction or for any purpose.

It appears from Exhibit 12 that complainant claims to have bought out its predecessor by paying it $119,335.29 as the alleged cost of its works, and by paying John Bensley in complainant's stock, valued at $112,500.00, in all $231,835.29.

There is no competent evidence in the record as

to the actual cost to this former company of its works or of the value of the alleged water right purchased from Bensley, and even if there was such evidence, it has been expressly held by this Court that what was paid by a company to its predecessor for property, or for property purchased at foreclosure sale or on reorganization, is not satisfactory evidence of the original cost.

Dow vs. *Beidelman,* 125 U. S., p. 680.

Accordingly, $231,835.29 is eliminated from the $798,429.61 claimed in Exhibit 12, leaving $566,-594.32 as the alleged cost.

There is no competent evidence, by receipts or otherwise, in support of the complainant's books of account *that it ever actually expended* this $566,-594.32 in construction of its works. The only witness as to these books of account and Exhibit 12 was Mr. Merritt, and he is not shown to have been connected with complainant in any capacity prior to July 1, 1883, when he became its secretary (Rec., 53).

It will be seen from Exhibit 12 that the canal was almost entirely constructed to and including the second parallel before that date, and that of said sum of $566,594.32 claimed to have been expended by complainant, at least the alleged cost amounting to $494,774.43 must be deducted, leaving but $72,-219.89 of alleged cost since Merritt became secretary

(Rec., 70, 71, 445, 446). It should be stated here that, the cost $85,877.82 of constructing the so-called "Outside canal," which did not reach Stanislaus County, is not to be considered, because that canal *was not begun until September, 1896,* whereas the rates complained of were fixed in June, 1896 (Rec., 84). Mr. Merritt testified only, that the books had been correctly kept, so far as he had kept them (Rec., 56), and that he did not know, except from the books, what had been spent for labor, materials, or for digging earthworks (Rec., 98). So there does not appear in this record any competent evidence showing the expenditure of even the remaining $72,219.89 of Exhibit 12.

The only other witnesses for complainant bearing on the cost of construction were the following:

F. L. Palmer, who testified that he was complainant's secretary from March 1, 1874, to June 30, 1883, and that he kept its accounts correctly. But that does not prove the expenditure of any money.

B. G. Chandos, testified that he had been complainant's superintendent for ten months from January 1, 1874, to November 1, 1874; and that he rendered monthly statements of his financial transactions for complainant.

R. M. Brereton, testified that he had been complainant's chief engineer for three months from October 15, 1874, to January 21, 1875, and had ren-

dered monthly statements of his financial transactions.

To the same effect was the testimony of George S. Hoffman, assistant superintendent, for twenty days, in December, 1877. The testimony of these last three witnesses covered a period of only thirteen months and twenty days, and none of them testified as to how much money be expended, or for what it had been expended, and their entire testimony does not prove the expenditure of any of the moneys embraced in Exhibit 12 (Rec., 303-4).

It also appeared from the minutes of a meeting of complainant's stockholders, held December 1, 1874, that it was admitted *there had been a loss of* $350,000.00 to the complainant, owing to the waste and bad management of Mr. Brereton, its chief engineer (Rec., 157). And at the stockholders' meeting of November 1, 1881, the president reported that, with careful management, "the canal will pay a fair revenue on what *it ought to have cost*" (Rec., 168).

WHAT COMPLAINANT'S STOCKHOLDERS PAID INTO THE COMPANY IS NOT SATISFACTORY EVIDENCE OF THE VALUE OF THE WORKS.

Complainant has 100,000 shares of stock, and it claims that its books show that $987,575.00 had been paid in by its stockholders, including the $112,500.00 in its stock, paid to John Bensley on purchase from its predecessor company (Rec., 62-63). There is no

competent evidence, by receipts or otherwise, showing such payments.

In the next place, what moneys stockholders may have paid into a corporation is not satisfactory proof of the value of the corporate property in this class of cases, as was decided in

Dow vs. *Beidelman,* 125 U. S., p. 680.

Furthermore, such evidence is especially unsatisfactory in this case, since it appeared that complainant engaged in farming operations on its own account and sustained large losses in the sum of $111,916.49 in that venture (Rec., 170). Such being the case, the moneys paid in by the stockholders could be no reliable criterion of the cost or value of the irrigation works. The burden of proving the cost of its works in a clear and satisfactory manner was upon complainant, and we submit that it wholly failed to do so, and furthermore that, even should the character of evidence submitted on this point by complainant be held to be sufficient, yet it can have but little weight in determining the value of its works, since a large portion of the alleged cost consisted of the alleged purchase price to its predecessor, and a large amount was lost in disastrous farming, and a large amount was wasted by the alleged extravagance of its engineers; so that the case, as to the cost of construction, comes within the language of this Court in *San Diego L. & T. Co.* vs. *Jasper,* 189 U.

S., 439, where it is said: "Yet the only evidence in "favor of a higher value in the present case is the "original cost of the works, seemingly inflated by "improper charges to that account, and by injudi- "cious expenditures (being the cost of another com- "pany, which sold out on foreclosure to appellant), "coupled with a recurrence to testimony as to the "rapid depreciation of the pipes. In this way, ap- "pellant makes the value over a million dollars. No "doubt the cost may be considered, and will have "more or less importance according to circum- "stances. In the present case it is evident for rea- "sons, some of which will appear in a moment, that "it has very little importance indeed" (p. 443).

Another important circumstance to be considered is that, when the main part of these irrigation works was constructed in the early 70's the prices of labor and materials were much higher in California than in June, 1896. This is most conclusively shown by the fact that the outside canal, whose construction was commenced in September, 1896, and which is 34.50 miles long (Map end of Record), cost $85,-877.82, or about $2,500.00 per mile (Rec., 84), whereas the alleged cost of extension A, being 29 miles of the main canal, completed in 1878, was $122,777.58, or about $4,233.00 per mile (Rec., 70, 98-99).

It appears from the testimony of Mr. Horace Wanzer, complainant's witness, that there is a total

of 310,000 acres of land under the canal—that is, irrigable therefrom (Rec., 102). Of this immense area only 37,311 acres were paying for water in 1896, when the Supervisors fixed the rates (Rec., 415). And yet, complainant claims that one-ninth of the lands under the canal should pay a profit on the entire cost of the whole canal. The same claim, under similar conditions, was made in *San Diego L. & T. Co.* vs. *Jasper,* 189 U. S., 439, and was denied by this Court, saying: "If a plant is built, as probably this "was, for a larger area than it finds itself able to "supply, or, apart from that, *if it does not as yet have "the customers contemplated,* neither justice nor the "Constitution requires that, say, two-thirds of the "contemplated number should pay a full return. "* * * The Statute of California no doubt was "contemplating the case of water works fully occu- "pied within the area which they intended to supply. "It hardly can have meant that a system constructed "for six thousand acres should have a full return "upon its value from five hundred, if those were all "that it supplied. At all events, we will not be the "first to say so. *If necessary to avoid that result, we "should assume that only a proportionate part of the "system was actually used and useful within the "meaning of the statute"* (p. 447). (*Italics ours.*)

V.

THE VALUATION BY THE SUPERVISORS OF COMPLAINANT'S WORKS AT $337,000.00 WAS FAIR AND REASONABLE.

We have already seen that the report of the expert civil engineers and the sworn testimony of Engineer Goodwin on the hearing before the Board of Supervisors fixed the cost of reproducing complainant's works at $312,358.00, and their value at $251,000.00, and the cost of maintenance per annum at $13,250.00, also that the Board raised such valuation to $337,000.00, and such cost of maintenance, including taxes, to $22,000.00 (Rec., 187, 459, 460).

We have also seen that complainant did not undertake in the slightest degree to assist the Board in determining either the then cost of reproducing its works or their then value, other than to introduce evidence tending to show their original cost. We think we have also made it clear that such alleged original cost is not the proper basis of valuation, and that it is, especially in this case, an improper basis under all the facts surrounding it.

We now say, as to the valuation made, that it was fair and reasonable. This appears, primarily, from the sworn and uncontradicted testimony of the expert civil engineers, Goodwin and Grove, showing that the value of the works was even less than the cost of their reproduction because of the deprecia-

tion of the lumber and of the filling up of the canal in many places with silt (Rec., 189, 190). The valuation by the Board is further sustained by the fact that, *the assessed value of the works for purposes of taxation in all the three counties did not exceed in any year* $170,000.00 for the years 1896, 1897 and 1898, nor the sum of $28,750.00 for value of the works in Stanislaus County (Rec., 111 to 116). Another corroboration of the Board's valuation is the value of complainant's stock, consisting of 100,000 shares. It appears in evidence that it sold in 1881 for $2.75 a share, and that after the water rates complained of had been fixed by the Supervisors, viz., in February, 1897, such stock sold for $4.00 a share (Rec., 168, 302).

A further strong corroboration of such valuation is the fact, already mentioned, that the cost of constructing the "outside canal" in 1897 and 1898 was about $2,500.00 per mile. The entire canal of 71 miles would at the same rate cost $177,500.00, and should we add $150,000.00—a more than liberal estimate—to cover dam, parallels and other works, the entire cost would be $327.500.00 Considering thus all the evidence bearing on the subject, we claim it to be clearly shown that the valuation by the Board of Supervisors of complainant's works in June, 1896, was fair and reasonable at the sum of $337,000.00. and that complainant, upon whom the burden of proof rested in the trial Court, has not

shown the contrary. but has relied solely upon the alleged original cost.

THE COST OF MAINTENANCE FIXED BY THE SUPERVISORS AT $20,000.00 PER ANNUM WAS REASONABLE.

It does not appear that complainant introduced before the Board of Supervisors any evidence whatever as to the cost of maintenance.

The petitioning taxpayers introduced the evidence of the experts who placed such cost at $13,250.00 (Rec., 188). and which the Supervisors raised to $20,000.00. On the trial in the Circuit Court, complainant put in a statement, Exhibit 3, of the alleged cost of maintaining its works for 1896-1897 and 1898, showing an average annual cost of $24,262.41. This evidence as to these years was clearly improper and could not show that the Supervisors *erred in June, 1896,* in fixing such cost at $20,000.00.

Defendants objected to the introduction of this statement on the ground that it was incompetent (Rec., 57, 402). No evidence was introduced to show the actual expenditure of any of the amounts shown by Exhibit 3. At page 146 of the Record appears complainant's alleged yearly cost of maintenance for nine years immediately preceding 1896, from which the average annual cost appears to be $22,045.16. It does not appear that this was in evidence before the Supervisors, nor were the alleged

expenditures proved on the trial, nor is there any substantial difference between such cost and the amount allowed by the Supervisors.

VI.

THE WATER RATES FIXED BY THE BOARD OF SUPERVISORS OF STANISLAUS COUNTY DID NOT, AND DO NOT, DEPRIVE COMPLAINANT OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW. THE TOTAL NET INCOME THAT COMPLAINANT WAS ENTITLED TO RECEIVE IN ALL THREE COUNTIES AFTER THE FIXING OF THE RATES BY THE SUPERVISORS OF STANISLAUS COUNTY FOR THAT COUNTY, WAS GREATER BY $4,918.69 FOR 1897, AND BY $2,634.82 FOR 1898, THAN THE AVERAGE NET INCOME THERETOFORE RECEIVED BY IT, AND THE THEORY UPON WHICH THE CIRCUIT COURT DECIDED AGAINST THE RATES FIXED BY SAID SUPERVISORS CANNOT BE SUSTAINED.

In the first place, the Courts of the United States do not undertake in this class of cases to require that any given per cent or income shall be realized by a corporation whose rates are regulated by the State. In enforcing the constitutional prohibition against the deprivation of property without due process of law, this Court requires only that the rates shall be reasonable as between the corporation and the rate-payers, considering the use and value of the prop-

erty employed, the service rendered and the extent of territory actually under irrigation able to pay. That such is the extent and limitation of this Court's review of these rates is settled by its decisions in the following cases:

San Diego L. & T. Co. vs. *Jasper,* 189 U. S., pp. 446, 447.
San Diego L. Co. vs. *National City,* 174 U. S., pp. 775-6-7.
Smyth vs. *Ames,* 169 U. S., pp. 466, 546.

As was said by Mr. Justice Harlan in *San Diego Land Co.* vs. *National City, supra* (p. 754): "But "it should also be remembered that the judiciary "ought not to interfere with the collection of rates "established under legislative sanction unless they "are *so plainly and palpably unreasonable* as to "make their enforcement equivalent to the taking "of property for public use without such compensa- "tion as under all the circumstances is just both to "the owner and to the public." (*Italics ours.*)

Complainant alleges in its bill that, on the 1st day of January, 1896, and up to the fixing of the rates by the Board of Supervisors of Stanislaus County on June 26, 1896, it charged its customers in the counties of Fresno, Merced and Stanislaus for irrigating alfalfa, $2.50 per acre per annum, and for irrigating cereals, $2.00 per acre per annum. (As the other subjects of irrigation are comparatively of small ac-

count, we will, in our argument, refer only to the rates for alfalfa and for cereals.)

Complainant introduced statements from its books to show that under such rates, for the ten years immediately preceding the year 1897, its average annual gross receipts from irrigation in the three counties was $56,026.66; that its average annual cost of maintenance was $22,172.63, which would make its average annual net profit at the time the Supervisors fixed the rates in June, 1896, the sum of $33,854.03 (Rec., 145, 146).

Complainant's net annual income at that time therefore amounted to about 4¼ per cent upon $798,429.61, the alleged cost of its works as claimed in its Exhibit 12, and to about 10½ per cent on $337,000.00, the valuation of its works as fixed by the Supervisors.

The rates fixed by the Supervisors were, for alfalfa,, all perennial grasses and all cereals, $1.50 per acre per annum (Rec., 460), and such rates went into effect in Stanislaus County for the irrigation year of 1897, commencing July 1, 1896.

Now according to Exhibit 11, complainant's gross receipts in all three counties for the year 1897, after the rates fixed by the Supervisors of Stanislaus County had gone into effect *as to that county only,* were $55,760.00 (Rec., 429), and deducting therefrom the cost of maintenance for that year, viz., $19,940.87 (Rec., 402), we have $35,819.13, net income for the year 1897, or $1,965.10 more than the $33,-

854.03 annual average net income it had theretofore been receiving. So that, even on the collections that complainant claims it actually made for 1897, we cannot see how there can possibly be any ground for complaint. But the evidence shows that complainant did not collect more money for the year 1897 solely *because it voluntarily reduced its rates in many instances in the counties of Merced and Fresno,* and that, if it had charged for 1897, in those two counties, the rates it had therein charged in 1896, termed by it "its regular rates," its net income for 1897 would have been considerably more than it claims to have collected. This clearly appears from the evidence.

D. M. Rouse, complainant's superintendent, testified that after the Supervisors had reduced the rates in Stanislaus County, complainant itself reduced them of its own accord in Merced County (Sec. 122), and examination of Exhibit 11 for year 1897 will show that such voluntary reduction by complainant was also made in Fresno County (Rec., 421 to 427). What this reduction of 1897 amounted to is easily arrived at. On pages 429 and 430 of the Record appears an estimate by complainant of *what it would have received* in all three counties in 1897 *had it collected its "regular rate,"* and the total sum arrived at is $64,708.50. Now in this estimate are 5,764.75 acres of land in Stanislaus County, estimated at $2.50 per acre, or $14,411.87, and 440.25 acres of grain at $2.00 per acre, or $880.00; total, $15,292.37.

This, at the Stanislaus rate of $1.50 per acre, would amount to $9,307.50, or a difference of $5,984.87 from the so-called regular rate. Now, if this difference be deducted from the above $64,708.50, *we have $58,723.63 which complainant would have received for 1897 had it not voluntarily reduced its rates in the counties of Merced and Fresno.* By looking at the receipts for 1898, and making the same kind of deduction as to Stanislaus County, we see that complainant would have collected for that year $66,015.36 instead of $65,991.37, which it claims to have collected exclusive of the "outside canal" (Rec., 444).

We cannot possibly understand how complainant can claim that the rates fixed by the Board of Supervisors for Stanislaus County are so unfair and unreasonable as to deprive it of its property without due process of law, when, immediately following the fixing of such rates for that county, it of its own accord, reduced the rates in the other two counties. Now, if we deduct from the $58,723.63 the gross income it would have received for 1897 at the Supervisors' rates in Stanislaus County and at its "regular rates" in the other two counties, $19,940.87 its cost of maintenance for that year (Rec., 402), We have $38,772.72 net income, which is $4,918.69 more than the average annual net income it was receiving up to 1897, and which amounts to about 4 8/9 per cent per year on $798,429.00, the alleged cost of the

works, and to about 11 per cent on $337,000.00, the valuation by the Supervisors. On the same basis, complainant would have received for 1898, exclusive of "outside canal," $2,634.82 more than such average annual net income. But if complainant was, for any reason, justified (which we deny) in thus voluntarily reducing its rates in Merced and Fresno Counties, it yet appears from its own showing to have actually made a net profit in 1897 of $35,820.00 (Rec., 402, 429), and in 1898, exclusive of "outside canal," of $36,464.86 (Rec., 402, 444). It should be further noted that the expenses for 1898 were about $7,000.00 above the average, viz., $29,526.51 (Rec., 146, 402). These are larger profits than it was accustomed to make before the Stanislaus rates went into effect, and it is impossible to conceive how complainant can possibly maintain this bill upon any such showing.

On reaching this point, this Court will, we think, naturally say, well, if this is all so, by what process and upon what theory did the Circuit Court decide that the rates complained of were fixed by the Supervisors so low as to deprive complainant of any property whatever.

THE THEORY URGED BY COUNSEL AND ACCEPTED BY THE CIRCUIT COURT, AND UPON WHICH IT DECIDED THIS CASE, AND IN WHICH, WE CLAIM, IT CLEARLY ERRED, WAS THAT THE RATES FIXED BY THE SUPERVISORS OF STANISLAUS COUNTY MUST BE HELD VOID BECAUSE THEY MUST BE CONSIDERED BY THE COURT AS THOUGH FIXED TO OPERATE, NOT ONLY IN STANISLAUS COUNTY, BUT ALSO IN MERCED AND FRESNO COUNTIES, AND THAT, WHEN SO CONSIDERED, IT WAS CLAIMED THAT THE REVENUE THEREFROM IN ALL THREE COUNTIES WOULD BE UNREASONABLY REDUCED.

As argument upon and exemplification of its theory, complainant made in Exhibit 11, *estimates* which show that, upon such theory, its gross income for 1897 would be only $40,799.50 (Rec., 429, 430), and for 1898 only $54,238.24 (Rec., 444).

Now the Court will bear in mind, in the first place, that this was *mere theory* and *not a fact* in this case, for the rates fixed by the Supervisors of Stanislaus County only *were not, for the years 1897 and 1898, or at any time, put in operation in the two other counties by the Supervisors of those counties, nor have any rates ever been fixed by the Supervisors of either of those counties,* and we have furthermore already seen from Exhibit 11 that complainant, ever since the rates were fixed by the Supervisors of Stanislaus County in 1896, has charged and collected in the

two other counties rates fixed by itself, in most cases according to its so-called "regular rate" of $2.50 and $2.00 for alfalfa and cereals, and in some instances voluntarily reduced by it, as already pointed out. So that, *the revenue actually collected by complainant in those two other counties for 1897 and 1898* have, as we have seen, greatly exceeded what they would have collected had the Supervisors' rate of $1.50 in Stanislaus County been in actual operation in the two other counties. In short, *the rates fixed by the Supervisors for Stanislaus County alone, have never, as matter of fact or in law, been enforced or enforceable in the two other counties, and the contention of counsel rests solely upon supposition and theory.* That the Circuit Court accepted this theory and decided this case upon it, is shown by the opinion of the learned Judge of that Court as follows: "The dam-
" age to the complainant arises out of the fact that,
" but for this order of the Board of Supervisors of
" June 26, 1896, fixing the rate that complainant
" might charge for water supplied to consumers in
" Stanislaus County for irrigating alfalfa and peren-
" nial grasses and cereals, $1.50 per acre per annum,
" complainant would have continued to charge such
" consumers for irrigating alfalfa, $2.50 per acre per
" annum. The evidence shows that the rate fixed by
" the Board of Supervisors reduces the income of
" the company considerably below six per cent *upon*
" *the capital actually invested* in the property of the

" corporation, *and if a corresponding reduction were* " *made in Fresno and Merced counties, its income* " *would, under the most favorable conditions, be re-* " *duced to less than five per cent per annum on the* " *value of the property as estimated by the Board* " *of Supervisors.* Is this valuation of complainant's " property correct?" (Rec., 48). (*Italics ours.*)

That the Circuit Court must have decided the case solely upon the theory in question is undeniable, when we refer to the figures as to net receipts for 1897 and 1898, already given, and which show that such actual net receipts were even greater after the rates were fixed in Stanislaus County than their annual average before, and that, had complainant not, of its own accord, reduced some of its rates in Merced and Fresno counties, its net receipts would have been considerably greater. Now there was absolutely no basis for this theory so accepted by the Circuit Court, since under the Act of 1885, the Supervisors of Stanislaus County had no power whatever to fix the rates in the two other counties, and since under that Act they had a right to fix the rates for Stanislaus County *in the belief and on the supposition that the rates in the two other counties would remain unchanged until the Supervisors of those counties should fix them,* because it was expressly provided in Section 5 of that Act that, *until the Supervisors of those two other counties should fix rates, the rates to be collected by complainant in those*

counties should be the rates therein established and collected by it; and further in Section 6, to the effect that the rates fixed by the Supervisors of Stanislaus County might be abrogated and new rates fixed a year after June 26, 1896. This being the law under which the Supervisors of Stanislaus County were acting, how can it be possible to hold that they, in fixing the rates for Stanislaus County only, must be presumed to have fixed them on the theory that they would apply also in the two other counties, although they did not in fact, nor could they in law, so apply. Practically the same contention was made by the Water Company in *San Diego Land Co.* vs. *National City,* 174 U. S., 739, and was disposed of by this Court as follows: "One of the points in dispute in- "volves the question whether the losses to the appel- "lant arising from the distribution of water to con- "sumers *outside of the city* are to be considered in "fixing the rates for consumers within the city. In "our judgment the Circuit Court properly held that "the defendant city was not required to adjust rates "for water furnished to it and to its inhabitants, so "as to compensate the plaintiff for any such losses. "This is so clear that we deem it unnecessary to do "more than to state the conclusion reached by us on "this point" (p. 758).

The Supreme Court of California has expressly decided that a water company can, under the Act of 1885, and until the Supervisors of a county have

fixed rates thereunder, collect from the consumers in such county the rates it may have itself fixed.

Fresno Canal, etc., Co. vs. *Park,* 129 Cal., 437. 445.

In support of their theory, counsel for complainant, as before stated, inserted in Exhibit 11 estimates showing that, if the Stanislaus rate of $1.50 should be applied in all three counties, the gross receipts of complainant would be $23,909.00 less than such receipts at its so-called "regular rate" for 1897, and $29,856.50 less for 1898 (429, 430, 444). But even in these estimates counsel has made a gross error, since in estimating under the Stanislaus rate of $1.50, he has charged Miller & Lux and their tenants at the rate of only 75 cents an acre, for which there is absolutely no warrant if this theory of the application of the $1.50 in all three counties be correct. This error as to 18,913 acres, on correction adds $14,184.75 to said gross receipts for 1897, making the total $54,984.25, and the correction of the same error as to 1898 would make the total gross receipts on complainant's theory, $81,238.24 (Rec., 429, 430, 444).

So that, even should complainant's theory be accepted, it would, after deducting cost of maintenance, have received $35,043.38 net income for 1897, and $51,711.73 net income for 1898; both greater than the average income received before the rates

were fixed by the Supervisors. Since under the Act of 1885, the rates fixed by Stanislaus County by its Supervisors could be abrogated and fixed anew at the end of a year upon complainant's petition, the Supervisors furthermore had a right to act on the theory that application to refix the rates would be made should the other counties act in the matter to complainant's detriment.

We contend, first, that the rates fixed by the Supervisors of Stanislaus County could, under the Act of 1885, apply within that county only, and that as matter of fact they were only so applied by complainant, notwithstanding its said theory to the contrary.

Second, that in determining whether or not the Supervisors' rates so applicable and applied in Stanislaus County only, deprived complainant of property without due process of law, they should be considered in connection with the rates actually enforced by complainant in the two other counties; in other words, the actual income from the whole system is the test, as was decided by this Court in *St. Louis & San Francisco Ry. Co.* vs. *Gill,* 156 U. S., 649, where statutory rates *applicable to a part only* of the railroad were attacked. This Court there said: "The "company cannot claim the right to earn net profit "from every mile,, section or other part into which "the road might be divided, nor attack as unjust a "regulation which fixed a rate at which some such

"part would be unremunerative; that it would be "practically impossible to ascertain in what propor- "tion the several parts should share with others in "the expense and receipts in which they partici- "pated; and finally, that to the extent that the ques- "tion of injustice is to be determined by the effects "of the Act upon the earnings of the company, *the "earnings of the entire line must be estimated as "against all its legitimate expenses under the opera- "tion of the Act within the limits of the State of "Arkansas*" (p. 665). (*Italics ours.*)

THE EVIDENCE SHOWS THAT THE RATES FIXED BY STANISLAUS COUNTY WERE REASONABLE AND SHOULD BE LOWER IN THAT COUNTY THAN IN THE TWO OTHER COUNTIES, BECAUSE OF THE POOR SERVICE RENDERED BY COMPLAINANT IN THAT COUNTY.

The question of the reasonableness of the rates depends not only upon the value of the works, *but also upon the value of the service rendered.*

> *Smyth* vs. *Ames,* 169 U. S., p. 547.
> *San Diego L. Co.* vs. *National City,* 174 U. S., p. 755.

It appears from the evidence that, this irrigating canal with its parallels and laterals aggregates 120¾ miles within a distance of 71 miles (Rec., 71), and that it passes through Fresno and Merced counties

before it reaches Stanislaus County, into which it runs for 11½ miles (Rec., 111). Of the total of 37,-311.43 acres of farming lands irrigated in 1896, when the rates were fixed, 6,536.93 acres, or a little over 1-5th, lay in Stanislaus County, being all of Orestimba section, 6,440.93 acres, and 96 acres of Las Garzas section (Rec., 326, 415). C. E. Grunsky, Walter Jones and J. P. McGray, civil engineers and witnesses for complainant, testified that this canal, in carrying the water from its head works in Fresno County to its terminus in Stanislaus County, would lose from 20 to 30 per cent of the water from seepage and evaporation (Rec., 116 to 122). R. H. Goodwin, civil engineer, testified for defendants that the canal was "filled up in many places with silt" (Rec., 190). D. M. Rouse, superintendent of the canal, testified that the water in the canal was short in August, September, October and November of each year; that when the water was low, he would shut off the water from points above Stanislaus County and endeavor to send all the water down to that county and let them irrigate for a week or ten days, and then take it away from there; that he sometimes could get about half of the water down to Stanislaus when none of it was diverted elsewhere; that in the Fall he had *"a good deal of trouble down "at the lower end of the ditch about getting water "there, that there are times when there is not water "to run down there"* (Rec., 121, 122, 127). Mr. J.

T. Crow, a farmer in Stanislaus County, irrigating from the canal, testified that, at one time in 1898, the people in Stanislaus County could not even get water for their stock when water was being used for irrigation above Stanislaus County, and that for about two months the people in Stanislaus County did not get any water (Rec., 259, 265, 268). To the same effect was the testimony of Mr. C. C. Eastin (Rec., 273, 278). Mr. H. F. Sherman testified that, in August, 1897, he could not get water from the canal for irrigation when, at the same time, it was running down Las Garzas creek waterway (Merced County) to irrigate the wild lands of Miller & Lux (Rec., 287, 288). Complainant contended on the trial that, in times of low water, the irrigators in Stanislaus County had to give way to those above them on the canal because such upper irrigators were the first users of the water, and therefore had the prior right.

From all of which it appears with certainty that, the irrigators in Stanislaus County, being at the lower end of the canal, do not get the same amount of water from this canal in the dry season, when most needed, as those above them, and that this failure is due for the most part to the difficulty in delivering water in sufficient quantity at the end of the canal in the dry season, and that such failure is also partly due to discrimination by complainant in favor of Miller & Lux, who, as will hereafter be fully shown, own a majority of complainant's stock and who control and

operate this canal mainly for the benefit of their own irrigation at the expense of the rate-payers. Consequently, *the service received* by the rate-payers in Stanislaus County *was so poor,* from whatever cause is immaterial, *as to entitle them to a lower rate* than that charged in the other two counties.

THE OPERATION OF THE RATES, CONSIDERING THE VALUE OF THE CANAL IN STANISLAUS COUNTY ONLY.

Should the Court be of the opinion that the value of complainant's canal and the income therefrom should be considered with reference to such value and income in Stanislaus County only, then the estimates should be based upon the proportionate acreage from which revenue was derived in 1896 when the Supervisors' rates were fixed.

In 1896 the total of such acreage in all three counties was 37,258 acres, and of this 6,536 acres, or 17½ per cent, were in Stanislaus County (Rec., 326, 415). Now, if we first take $789,429.00, the alleged original cost of the entire canal as the value, then 17½ per cent of that sum, or $138,150.00, is the original cost value of that part of the canal used and useful in Stanislaus County. The total income collected in Stanislaus County for 1896, and just before the Supervisors' rates went into effect, was $15,696.00. The cost of maintaining the whole canal for 1896 was $23,319.00, of which 17½ per cent, the amount

chargeable in Stanislaus County, was $4,080.00, which gives net income from Stanislaus County in 1896 of $11,616.00, or about 8 1-3 per cent upon $138,150.00, the canal's cost value in that county. (Rec., 146, 326, 415). In 1897, under the Supervisors' rates, the net income in Stanislaus County was $7,482.00, or about 5 1-3 per cent upon such cost value in that county (Rec., 146, 226, 428). In 1898 such net income was $10,400.00, or nearly 7½ per cent upon such cost value (Rec., 326, 443).

Now, if we estimate in the same way upon $337,000.00, the present value of the entire canal as fixed by the Supervisors, we have as 17½ per cent thereof, or its useful value in Stanislaus County in 1896, the sum of $58,975.00. On this valuation, complainant's net income, under the Supervisors' rates, was about 12½ per cent for 1897, and about 17 per cent for 1898. From all of which, we claim it most conclusively appears that complainant is deriving a very large income in Stanislaus County under the Supervisors' rates based upon the value of the canal used and useful in that county, and especially so when we consider that the rate-payers in that county get comparatively very poor service, and it certainly does not appear that these rates in any manner deprive complainant of any property without due process of law.

Should similar calculations be made based upon the proportion of mileage of the canal in Stanislaus County and not upon acreage, then the result would

be even more favorable to defendants, since of the 71 miles of the canal embracing all its works, 11½ miles thereof only are in Stanislaus County, or about 16¼ per cent of the whole. Considering that this Court has laid down the rule that these rates are not to be estimated upon the capacity of the canal, but with reference to the extent of country actually under irrigation and the service rendered, it would seem that the foregoing estimate, based on the acreage actually irrigated and producing revenue is the most just to all concerned.

San Diego L. & T. Co. vs. *Jasper,* 189 U. S., p. 445.
Smyth vs. *Ames,* 169 U. S., p. 547.
San Diego L. Co. vs. *National City,* 174 U. S., p. 755.

AS CONCLUSIVE PROOF THAT THE RATES FIXED IN 1896 BY THE SUPERVISORS OF STANISLAUS COUNTY WERE FAIRER AND MORE REASONABLE THAN THOSE THERETOFORE PREVAILING IN THAT COUNTY, IT APPEARS IN EVIDENCE THAT FOR THE YEAR 1898, THE ACREAGE UNDER IRRIGATION IN THAT COUNTY WAS GREATLY INCREASED UNDER THE SUPERVISORS' RATES.

In 1896, the total acreage under irrigation in Stanislaus County, under complainant's then so-called "regular rates" before the Supervisors' rates took

effect, was 6,440 acres in Orestimba section and 96 in Las Garzas section; total, 6,536 acres (Rec., 326, 415). In 1897, there was apparently no increase of acreage in Stanislaus County, but in 1898, such acreage *in that county* under irrigation rose to 9,864 acres in Orestimba section, and in that part of Las Garzas section lying in that county to 170 acres; total, 10,034 acres, or an increase of 3,497 acres (Rec., 443). Complainant may claim this increase of over fifty per cent in the space of two years to be due to the new "Outside canal." This, however, was fully disproved on the trial by the testimony of complainant's witness and Secretary Mr. Merritt, who swore that this "outside canal" ran only as far as Los Banos creek, and that it was built to irrigate lands other than those under the present (main) canal running into Stanislaus County (84, 85). It will be seen from the map at the end of the record that, the "outside canal" stops at Los Banos Creek, fully fifteen miles from Stanislaus County. The Court will also, on examining Exhibit 11, at page 43 of the Record, see that the irrigation from this "outside canal" yielded in 1898, $11,131.70, which sum is not included in the figures given on the same page as to acreage and receipts from the Orestimba and Las Garzas sections. This shows beyond question that the increase in acreage could not have been due to the "outside canal." In addition to the foregoing, we have the direct testimony of Mr. Emil S. Wan-

genheim that the people of Stanislaus County, since the Supervisors fixed the rate at $1.50, had put a good deal more land under irrigation than before (Rec., 255). This undoubtedly explains why complainant has not applied to the Supervisors of Stanislaus County to fix anew these rates, and also why it voluntarily reduced the rates in Merced and Fresno counties; and it furthermore shows most conclusively that, the Supervisors' rates were more reasonable and beneficial in their actual operation to both complainant and its customers than were the former rates.

In connection with this matter we also direct attention to the testimony of defendants' witnesses Emil S. Wangenheim, J. S. Crow, C. C. Eastin and H. F. Sherman, all irrigators in Stanislaus County, to the effect that, at complainant's former rate of $2.50 per acre per year, the farmers could not profitably carry on their business, but that they could make some profit at the Supervisors' rates of $1.50 (Rec., 251 to 297). To offset this testimony, complainant introduced the testimony of twelve witnesses, seven of whom resided in Merced County, where, as we have seen, plenty of water from this canal can be had when the people of Stanislaus County can get very little, and sometimes none at all.

These witnesses testified in effect that, under the $2.50 rate, a farmer might make a profit of from $15.00 to $25.00 an acre from alfalfa, if he had

first-class soil, if everything was in good shape for irrigation, if the alfalfa did not rot, if there was plenty of water—and in short, if every condition was favorable.

But on the cross-examination of these witnesses, it did not appear that they, in their estimates, had included the interest on their investments or the taxes on the land, and only a few of them were able to show that they had made any money at all, and that very little. We do not see how this sort of testimony can assist the Court very much, and it most assuredly cannot overcome the fact in this case that the reduction of the rate by the Supervisors of Stanislaus County resulted, as before shown, to an increase of over fifty per cent in the irrigated acreage in that county (Rec., 305 to 373).

DIVIDENDS.

It appears that complainant has paid the following dividends on its 100,000 shares of stock:

1881	50 cts	$50,000
1882	40 cts	40,000
1883	25 cts	25,000
1885	15 cts	15,000
1887	60 cts	60,000 from sale of land.
1887	20 cts	20,000
1888	20 cts	20,000
1890	10 cts	10,000

1890.....	10 cts.....	10,000	from sale of land
1891.....	25 cts.....	25,000	
1892.....	25 cts.....	25,000	
1893.....	40 cts.....	40,000	
1894.....	40 cts.....	40,000	
1895.....	40 cts.....	40,000	
1896.....	20 cts.....	20,000	
1898.....	10 cts.....	10,000	

(Rec., 65, 67).

The reason that a dividend was passed in 1897, and that those for 1896 and 1898 were smaller than usual, is that $85,877.82 of the profits were expended on the "outside canal" that was begun in September, 1896, and completed in November, 1897 (Rec., 84, 85, 86, 87, 69). On November 15, 1898, after paying the $10,000.00 dividend for that year, and the application of moneys to the "outside canal," there remained in the complainant's treasury $23,219.20 of undivided profits (Rec., 69).

COMPLAINANT'S OTHER RATE THEORY.

Complainant urged in the Circuit Court, and may repeat here, still another theory upon which it claimed the Supervisors of Stanislaus County should have fixed the rates, viz: that inasmuch as the Act of 1885, in Section 5, provided that the rates should be fixed so as to give as near as may be not less than six per cent upon the value of the property used and

useful in furnishing water, and inasmuch as, according to complainant, all of the works above Stanislaus County were used and useful for irrigation in that county, and as that part of the works in that county were not, it claimed, used or useful to irrigate in the two other counties, and as the works in Stanislaus County were but one-eighth of the whole, that therefore, according to some subtle mathematical devices invented by counsel, the irrigators in Stanislaus County should be made to pay considerably more for water than those in the two other counties. The Judge of the Circuit Court did not accept this theory, nor even refer to it in his opinion, and we do not see any merit in it, or how it can be seriously urged. In the first place, it is not true that the works lying in Stanislaus County are not used or useful to the operation of those in the two other counties, since it must be apparent that the maintenance and operation of and income from the canal as a whole, and of the size and capacity required for all three counties, enables it to give better and cheaper service in the two other and upper counties than could be done if the canal was smaller and limited to those counties. The income received from the operation of the canal in Stanislaus County helps to maintain the canal and reduce the price of service in the two other counties. The case is analogous to assessed valuation of an entire railroad in a State and the apportionment of such valuation among the several counties according to

mileage therein for purposes of taxation. Parts of the railroad may earn very little as compared with other parts, and, in a sense, be less valuable, but the earning capacity of the entire road depends upon its operation as a whole, and the earning capacity of each part depends in a large measure upon the operation of all the parts as a unit. This method of valuing and apportioning the valuation of railroads for taxation purposes has been sustained by this Court, and we can see no substantial difference between that case and this as to the question raised.

Chicago, etc., R. R. Co. vs. *Iowa,* 94 U. S., 155.
State R. R. Tax Cases, 92 U. S., 575.
Columbus S. Ry. Co. vs. *Wright,* 151 U .S., 470.

Besides, if complainant's theory be applied to its logical conclusion, the irrigator near the head of this canal would get plenty of water at comparatively small cost, while the irrigator in Stanislaus County at the end of the canal, who gets comparatively little water and sometimes none at all—in short, much poorer service—would have to pay a much greater comparative rate.

VII.

THE EVIDENCE SHOWS THAT MILLER & LUX SINCE 1897 HAVE OWNED A MAJORITY OF THE STOCK IN COMPLAINANT CORPORATION AND HAVE CONTROLLED ITS BOARD OF DIRECTORS AND MANAGEMENT, AND THAT UNDER SUCH CONTROL, COMPLAINANT HAS ALLOWED AND STILL PERMITS MILLER & LUX TO IRRIGATE FROM ITS CANAL MANY THOUSANDS OF ACRES OF CULTIVATED LAND AT RATES LOWER THAN THOSE CHARGED TO OTHERS AND ALSO TO IRRIGATE WITHOUT ANY CHARGE A LARGE TRACT OF UNCULTIVATED LAND USED BY MILLER & LUX FOR PASTURAGE; AND THAT, IF SUCH DISCRIMINATION DID NOT EXIST, COMPLAINANT'S REVENUE WOULD BE GREATLY INCREASED. IN THE FACE OF SUCH DISCRIMINATION, A COURT OF EQUITY WILL NOT SET ASIDE AS UNREASONABLE THE SUPERVISORS' RATES COMPLAINED OF.

Miller & Lux was, until some time in 1897, a co-partnership consisting of Henry Miller and Charles Lux. After the death of Charles Lux, a corporation, Miller & Lux Company, was organized, to which, on June 4th, 1897, the business of the co-partnership was turned over (Rec. 60). The evidence shows that Miller & Lux has had, *since 1877, absolute control of complainant corporation.* It appears from the testimony of Mr. C. Z. Merritt, complainant's

secretary, that of the 100,000 shares of complainant's capital stock, Miller & Lux Co. own 54,503 shares, and that, in addition thereto 13,941 shares stand in the name of Henry Miller, of Miller & Lux Co. So that Miller & Lux own or control 68,444 shares of the 100,000 shares of complainant's stock (Rec. 60, 80, 81, 82). Of the seven directors or trustees of complainant corporation, four, viz.: Messrs. Allen, Nickel, Potter, and Mr. Henry Miller represent the interests of Miller & Lux Co. Mr. Miller is part owner in Miller & Lux. Mr. Nickel is Mr. Miller's son-in-law, Mr. Potter is a stockholder in Miller & Lux, and the executor of the will of Charles Lux, deceased. Mr. Allen's wife is a stockholder in Miller & Lux, and it was admitted that he held stock in complainant also for the benefit of Miller & Lux. Mr. Henry Miller is the President and Chief Executive officer of complainant and gives general directions to the Superintendent touching matters of policy and management (Rec. 59, 78, 79).

It also appears from resolutions passed by complainant's directors that Henry Miller was given authority to employ and discharge, in his discretion, all persons in complainant's employ; to settle all claims of wages and supplies and to draw drafts (Rec. 161, 168, 170). And finally, although Mr. Merritt testified that Miller & Lux first obtained a controlling interest in complainant in October, 1878 (Rec. 60), nevertheless complainant's counsel expressly admit-

ted on the trial that such control was first obtained on December 4th, 1877, and that ever since, Miller & Lux have had a majority of complainant's directors (Rec. 159).

It also appears that there are about 300,000 acres of land lying under complainant's canal irrigable therefrom, and that, of such lands, about 200,000 acres belong to Miller & Lux (Rec. 101, 102, 226).

In 1896, the total acreage of *cultivated lands* irrigated by this canal was 37,311.43 acres, of which Miller & Lux irrigated 20,808 acres. In 1897, such total was 37,098.50 acres, of which Miller & Lux irrigated 21,173 acres. In 1898, such total was 47,145.50 acres, of which Miller & Lux irrigated 23,978 acres (Rec. 415, 428, 429, 444). We will first deal with the discrimination in irrigating these cultivated lands, and then with the free water to Miller & Lux for their uncultivated or pasturage lands.

On the 18th day of May, 1871, complainant's predecessor, the San Joaquin & Kings River Canal Company, made a contract (Complainant's exhibit 4) with Miller & Lux, whereby the canal company agreed to construct a canal for 60 miles, and to furnish Miller & Lux water to irrigate 50,000 acres of land, and whereby, under certain conditions. Miller & Lux were to pay the Canal Company a subsidy of $20,000. Miller & Lux also agreed to give and grant a right of way for the canal over their lands in Fresno and Merced counties, and they also agreed to pay for ir-

rigation a sum not exceeding $1.25 per acre for each crop, or the prices paid by other parties (Rec. 380). After the incorporation of the complainant, viz: on the 7th day of February, 1872, complainant and Miller & Lux entered into a contract (Complainant's exhibit 5), by which the above contract, Exhibit 4, was expressly cancelled. By Exhibit 5 Miller & Lux agreed to pay complainant a subsidy towards building the canal of $20.000.00. so that it would irrigate 50,000 acres of their lands Miller & Lux also *gave and granted* to complainant a right of way over their lands for the canal in the counties of Fresno, Merced and Stanislaus, and in clause 5, agreed to pay complainant "for water furnished by it, used "in irrigating each crop, the regular price paid by "others for irrigation not to exceed $1.25 per acre," and complainant agreed in clause 10 to furnish Miller & Lux "a sufficiency of water from its canal for "their cattle and for all domestic purposes of themselves, their tenants, and employees, free of charge" (*Italics ours.*) (Rec. 383.)

It appears that differences arose between complainant and Miller & Lux as to the non-payment by the latter for irrigation under the last above contract, and that, complainant brought suit against Miller & Lux to recover $70,000 on that account. Now, while this suit was pending, *and after Miller & Lux had obtained control of a majority of complainant's stock and of its Board of Directors,* complainant, on

November 12th, 1879, entered into a further agreement with Miller & Lux (Complainant's Exhibit 6), dismissing said suit, and making the following provisions as to charges against Miller & Lux for water (The Exhibit A referred to being the aforesaid Exhibit 5). "Said party of the first part in considera- "tion of the premises and of the execution and de- "livery of said deed (right of way) hereby coven- "ants and agrees that subdivision fifth of the con- "tract referred to as Exhibit 'A' in the complaint "filed in that certain action now pending in the Dis- "trict Court of the Nineteenth Judicial District of "the State of California, in and for the City and "County of San Francisco, entitled 'the San Joaquin "'and Kings River Canal and Irrigation Company "'vs. Henry Miller and Charles Lux,' being the "same contract hereinbefore referred to and bearing "date the seventh day of February, A. D. 1872, "shall be construed to mean that this Company the "party of the first part herein, will deliver water "thereunder at its regular rates not exceeding one "dollar and twenty-five cents per acre per crop, pro- "vided the crops are cut, but in case the alfalfa "lands should be pastured, then each supply of water "of the usual quantity supplied to produce a crop "shall be deemed to be such a supply as will entitle "a charge to be made therefore, the same as if a crop "shall be cut, and said subdivision shall likewise ap- "ply with the proviso aforesaid, to said Miller &

" Lux, their tenants, employees, heirs, executors and " administrators, and shall run with the land so long " as this company exists to the extent of thirty-three " thousand three hundred and thirty-three and one- " third (33,333 1-3) acres, but shall not apply to the " grantees of said Miller & Lux, nor to the grantees " of their heirs, executors, or administrators; and " subdivision tenth of said contract shall apply to all " domestic animals, owned pastured or cared for by " Miller & Lux, their tenants, employees, heirs, ex- " ecutors or administrators" (Rec. 140, 387). Complainant's Secretary, Mr. Merritt, testified that this $70,000 was, on this settlement, credited to Miller & Lux on their water account with complainant (Rec. 140). See also resolutions (Rec. 141-142). We see, therefore, that under this contract made in 1879, Miller & Lux could use all the water they desired and as often as they pleased to produce one crop a year to the extent of 33,333 1-3 acres at rates not exceeding $1.25 per acre, and that they and their tenants still had the right under subdivision 10 of the contract of February 7th, 1872, to free water for their cattle and domestic purposes.

That this constituted an outrageous discrimination appears from an examination of Exhibit 11. As to alfalfa, counsel will doubtless claim that Miller & Lux irrigated for only one crop a year. There is no evidence in this case that their irrigation was limited to one crop of alfalfa, but should we assume that

to be so, yet there remains the cereals, grain of which but one crop a year can possibly be raised, and the "hay" cut from wheat or barley of which but one crop can be grown each year. It appears from Exhibit 11 that for the years 1896 and 1897, while Miller & Lux were never charged more than $1.25 for grain, yet others had to pay from $2 to $1.50 for the same. This amounted in 1896, if we charge $1.50, to a difference of $2210 that complainant should have collected from Miller & Lux, and that it did not collect, and in 1897 to $2156.25 (Rec. 415, 429). But not satisfied with the discriminating rates, under Exhibit 6, complainant agreed with Miller & Lux Co., by still another contract (Complainant's Exhibit 22), dated December 24th, 1897, that the latter need only pay "for each crop irrigated, or for water furnished "of the usual quantity, supplied to produce a single "crop, *one half of the regular rates per season* of two "crops, but not in any case to exceed $1.25 per acre "per crop." (*Italics ours.*) (Rec. 396.) Here was a still further grossly outrageous reduction in favor of Miller & Lux to the extent of *one half of the regular rates,* and if we examine Exhibit 11 as to the receipts for 1898, when these further rates were first in operation as to Miller & Lux, we find that the total amount lost to complainant for that year at such reduced rates was $8,302 (Rec. 443, 444). By each of these contracts following the first one, Miller & Lux, controlling complainant's directors, obtained lower

and still lower rates. They constitute a progressive reduction of rates, so that the next one will probably give Miller & Lux water for nothing, because of the money subsidy and rights of way given by them years ago to induce the building of the canal, and which considerations were fully exhausted in Exhibit 5.

Whether these discriminating contracts are valid or invalid as between the parties to them cannot be here decided, since Miller & Lux are not parties to this suit. But even on the assumption that Miller & Lux can enforce such contracts against complainant, nevertheless we say that they have an important bearing upon the main question in this case. *How can complainant come into a Court of equity and expect to be heard to ask such Court for a decree that the Supervisors' rates are unreasonably low, and, at the same time, have it appear that in 1896, when these rates were fixed, it was, and ever since has, by contract with its largest consumer furnished water to that customer at rates not only less than the so-called "regular rates" at which it was supplying its other consumers, but even less than the Supervisors' rates complained of.* These discriminating contracts do not provide that they shall be in force for any period of time, and complainant, before bringing this suit, should have terminated them and subjected Miller & Lux to the same rates as others had to pay. Such discrimination being grossly unequitable, complain-

ant does not come into a Court of equity with clean hands and hence is not entitled to relief.

Galloway vs. *Findley*, 12 Pet., 297.
Roberts vs. *Northern Pac. R. Co.*, 158 U. S. 13.
New York vs. *Pine*, 185 U S. 103.

It is of course obvious that, but for the discrimination in favor of Miller & Lux, complainant's income would be very considerably increased in the amounts already indicated, so that, had there been no such discrimination, there could be no possible claim that the Supervisors' rates were insufficient, even were they considered as applied in all three counties. Complainant alleges in its bill "that on "the 1st day of January, 1896, and at all times there- "after, until the adoption of the pretended regula- "tion by the defendants of the rates of the complain- "ant, as hereinafter averred, the complainant "charged to its customers and the consumers of its "waters in the counties of Fresno, Merced and Stan- "islaus, the following sums and amounts: for irri- "gating alfalfa, $2.50 per acre per annum; for irri- "gating cereals, $2.50 per acre per annum." We now see from the evidence that such allegations were wholly untrue, since it appears from Exhibit 11, and from the discriminating contracts that a large part of the irrigation by Miller & Lux was given at much lower rates than those alleged in the

bill, and yet, in the face of this undisputed evidence the Judge of the Circuit Court said in his opinion Prior to this order of the Board of Supervisors *"the "rates which had been fixed by complainant and "charged* to consumers of water in the counties of "Fresno, Merced and Stanislaus, were as follows: "For irrigating alfalfa, $2.50 per acre per annum; "for irrigating cereals, $2 per acre per annum." (*Italics ours.*) (Rec. 48.) There is, we claim, *a fatal variance* between the allegations of the bill and the proof in this regard, irrespective of the question of equity.

COMPLAINANT STILL FURTHER DISCRIMINATED IN FAVOR OF MILLER & LUX BY GIVING THEM, WITHOUT CHARGE, THE SO-CALLED SURPLUS OR WASTE WATER FROM THE CANAL TO IRRIGATE 60,000 ACRES OF THEIR UNCULTIVATED LANDS FOR PASTURAGE PURPOSES.

Of the 300,000 acres of land under this canal, about 200,000 acres belong to Miller & Lux, of which it appears they irrigate as *cultivated land* from 20,808 acres in 1896, to 23,978 in 1898 (Rec. 415, 429, 444). Besides farming, Miller & Lux pastured their cattle upon their uncultivated lands irrigable from the canal. There appears to have been at certain times of the year a quantity of the water of the canal that was not purchased or used by irrigators of the cultivated lands, and which is referred to in the

record as the surplus or waste water from the canal. It is clear that if such so-called waste water is used by any person *who should pay for it,* that it cannot be said to be waste water, and that it would be properly waste water only when it cannot possibly be sold.

The evidence is clear in this record that complainant not only for years permitted, but that it finally, pending this suit, expressly agreed to the use by Miller & Lux of this so-called waste water without charge therefor. This waste water was very valuable to Miller & Lux in irrigating their vast tract of uncultivated land for the purpose of pasturing their cattle thereon. One of the witnesses, R. H. Goodwin, Civil Engineer, estimated that Miller & Lux were so irrigating 40,000 acres near the upper end of the canal (Rec. 228, 229). Mr. Emil S. Wangenheim testified that he resided in Stanislaus County, was a stockholder in Simon Newman Co., that had 3,000 acres below this canal that could be irrigated by the waste water that complainant wasted down San Luis Creek, that his company prepared to use that waste water, but that after his company had made such preparations, complainant never turned any more water down that creek, but turned it on the land of Miller & Lux; but that his company afterwards got some of this waste water *when it paid for it;* that one of the complainant's rules that puts it in practice up there is that, waste water must be paid for by the people using it; and that he knew that water

had been turned down the waste creeks when people have asked for it, and could have irrigated with it, but were refused it, and that such waste water ran down and spread out over the lands of Miller & Lux (Rec. 250 to 254).

Mr. J. S. Crow testified that he had lived at Crow's Landing, Stanislaus County, for twenty-five years; that Orestimba Creek (in Stanislaus County) was used as a waste way for this canal. That when the canal was built as far as that creek, it was emptied into the creek and ran into the San Joaquin river. That his father, who had owned 1000 acres of land there, had put a dam in the creek and had irrigated his land with the waste water from the canal, and that complainant required him to pay therefore $1.25 an acre. That Miller & Lux irrigated from 60,000 to 75,000 acres of land from the canal that was poor land producing very little grass before irrigation, but that since water had gone on it, it makes good feed and lots of grass that enabled Miller & Lux to pasture thereon many thousand head of cattle (Rec. 259 to 264).

H. F. Sherman testified that he had resided near Newman in Stanislaus County for twenty years; that he knew where the lands of Miller & Lux lay below the canal; that 75,000 or 80,000 acres of their uncultivated land was checked and levied for irrigation and was irrigated from the canal; that Miller & Lux had a perfect system of wing levees or dams for hand-

ling this waste water on their uncultivated lands, which, with the water on it, produced good stock feed upon which cattle got fat, and that it enabled Miller & Lux to sustain and keep there a large amount of cattle (Rec. 283, 284, 289, 290).

A. W. South, a Surveyor, testified that he had surveyed a large part of the land in the neighborhood of this canal and had observed the amount of uncultivated lands of Miller & Lux irrigated from the canal, and that he roughly estimated the same at 70,000 acres (Rec. 293-4).

If any further evidence is needed to thoroughly establish the fact that Miller & Lux for years have been and are still irrigating their large tract of pasturage land with this so-called waste water, it is furnished by the admissions of complainant in the resolutions of its Board of Directors leading up to the agreement it made with Miller & Lux pending this suit as to these waste waters. It appears that on May 5th, 1899, before the testimony in this suit was closed, complainant's directors met and that their attention was called to the fact that the defendants in this suit had charged that complainant was furnishing Miller & Lux with water free of charge, whereupon a committee was appointed to investigate and report (Rec. 172). That committee reported at the directors' meeting of May 17th, 1899, that Miller & Lux had a right to waste water from complainant's canal, free of charge (Rec. 173). Whereupon com-

plainant and Miller & Lux made the agreement dated May 18th, 1899 (Respondent's Exhibit E), as follows: "This agreement made this 18th day of May, "1899, by and between the San Joaquin and King's "River Canal and Irrigation Company, a corpora- "tion organized and existing under the laws of the "State of California, the party of the first part, and "Miller & Lux, also a corporation organized and "existing under the laws of said State, the party of "the second part, witnesseth: That whereas, prior "to the construction of the canal of the party of the "first part, Henry Miller and Charles Lux were the "owners of the land lying along and bordering upon "the San Joaquin River, and its sloughs, in said "State, and lying above and below the head of the "canal of the party of the first part, and were the "owners of riparian rights in and to the waters of "said river and sloughs, and had been accustomed "to and did actually use the waters of said river and "sloughs which naturally overflowed said lands, and "also to take water therefrom by artificial means, "for the purpose of irrigating said lands and fur- "nishing water for their cattle and live stock, and "for other domestic uses, in accordance with their "said riparian rights; and whereas, said Henry "Miller and Charles Lux, for the purpose of aiding "the construction of said canal of the party of the "first part, did pay to the party of the first part a sub- "sidy in money and conveyed to it a right of way for

" its said canal where the same passed through the " lands of said Henry Miller and Charles Lux of a " width of one hundred (100) feet on each side of " the center line of said canal, and permitted the " party of the first part to appropriate and divert " from said river through said canal eight hundred " (800) cubic feet per second of the water flowing " in said river; and whereas, at all times since said " appropriation was made by the party of the first " part, said Henry Miller and Charles Lux, and said " Henry Miller, as the survivor of them, and the " party of the second part (as the successor in inter- " est of said Henry Miller and Charles Lux) con- " tinued, as said riparian owners, to use the overflow " waters of said river and sloughs upon said lands for " the aforesaid purposes, and also to use for the pur- " pose of irrigating uncultivated land, and furnish- " ing water for their live stock and for other domes- " tic uses, and with the consent of the party of the " first part, and without any charge therefor by it, the " surplus water running in said canal not used or re- " quired by the water-consumers of the party of the " first part, other than said Henry Miller, Charles " Lux, and the party of the second part; and whereas, " during all said times it was understood by all said " parties that said Henry Miller and Charles Lux, " and said Henry Miller as the survivor of them, " and said party of the second part, as the successor " in interest of them, were of right entitled to the

"said use, without charge, of the said surplus water "in said canal; and that said party of the first part "was of right entitled to waste said surplus water on "said uncultivated lands; and whereas, the party of "the second part has agreed to permit the party of "the first part to appropriate and divert from said "river, through its 'outside canal,' three hundred "and fifty (350) cubic feet per second of the water "flowing in said river in addition to the aforesaid "eight hundred (800) cubic feet per second; now, "therefore, in consideration of the premises, and to "the end that the rights of the respective parties "hereto, as heretofore understood and recognized, "may be fixed and established, the party of the first "part does hereby confirm unto said party of the sec- "ond part the right to use, for the purposes of irri- "gating the said uncultivated lands above referred "to, and of furnishing water for its cattle and live "stock, and for other domestic uses, free of costs or "charge to it, all or so much of the surplus water "running in the canals of the party of the first part "as the party of the second part may desire to use "for said purposes, and which may not be used or "required by the other water consumers of the party "of the first part; and said party of the second part "does hereby confirm unto said party of the first part "the right to waste said surplus water on said un- "cultivated lands.

"And the party of the first part does hereby

"acknowledge and declare that it has no claim to "make against the party of the second part, or its "predecessors in interest, on account of the use here- "tofore made by it and them of said surplus water. "In witness whereof the said parties hereto have "caused these presents to be subscribed by their re- "spective presidents and secretaries, under their re- "spective corporate seals, all on the day and year first "above written.

"THE SAN JOAQUIN & KINGS RIVER CANAL & IRRI- "GATION CO.,

"By HENRY MILLER, President. (Seal.)
"By C. Z. MERRITT, Secretary.

"(Seal.) MILLER & LUX,
"By HENRY MILLER, President.
"By DAVID BROWN, Secretary" (Rec. 399).

The consent of about one-half of the minority stockholders of complainant to this agreement and the record of their meeting show that they failed to properly investigate or understand the matter, or were, as usual, afraid to act against those in control (Rec. 182).

All of this simply means that complainant, having, by reason of this suit, *been caught in the act of giving away* to its controlling stockholder water to irrigate thousands of acres of land for pasturing thousands of cattle, attempted to justify, possibly to its minority

stockholders, its unlawful acts in that regard. If the proceedings by and before complainant's board of directors leading up to this agreement are examined, it will be seen that no contest whatever in this matter was made or attempted against Miller & Lux; but as they owned a majority of complainant's stock and controlled absolutely its board of directors, the unexpected did not happen (Rec. 172 to 177).

Any one familiar with this record and with the law governing complainant in its exercise of its public trust in appropriating the public waters of the State for public use and for *sale or rental only* under such public use, will readily see the illegality of this alleged contract, although we are here not bound to show its invalidity, but only to point out its discrimination.

In the first place, it should be noted that the use of water for watering cattle and other live stock is a very different thing from its use for irrigating uncultivated land for the purpose of pasturing cattle or other live stock. By subdivision 10 of Exhibit 6, complainant had, as we have shown, granted Miller & Lux the use of water for their cattle and for domestic purposes (Rec. 385), and such right was in itself a great discrimination in favor of Miller & Lux, since they watered thousands of cattle, while other consumers had comparatively few. That this discrimination should not be glaringly apparent, com-

plainant does not appear to have charged any one anything for water for cattle or other stock, or for domestic purposes (Exhibit 11, Rec. 402). Consequently, the use by Miller & Lux of water for their live stock and domestic purposes has absolutely nothing to do (as pretended in this Exhibit E) with their use of this so-called waste water. The allegation in Exhibit E that Miller & Lux had, since the appropriation by complainant of the waters of the San Joaquin River, used the waste waters from the canal to irrigate uncultivated lands is shown by this record *to be false.* Extension A of the canal was completed to Orestimba Creek in Stanislaus County in September, 1878, and extension B to the end of the canal in 1881 (Rec. 70). Now it appears from complainant's minutes of May 1st, 1877, that the application of Miller & Lux to it for "water to overflow grass lands" was rejected by complainant, and that the rate for irrigating uncultivated grass lands was then fixed at $1.25 per acre (Rec. 159). It is, therefore, very significant that within eight months after such action by complainant's Board of Directors, Miller & Lux, on December 4th, 1877, acquired at the stockholders' election held on that day, control of complainant's direct[illegible], and which control they have held ever since (Rec. 159), so that the consent by complainant to the use by Miller & Lux of this so-called waste water dates only from the time that the latter came into control of the former, and it

is the kind of consent that Faust, after the sale of his soul, gave to Mephistopheles. It was compelled to consent.

Another alleged consideration in Exhibit E is to the effect that, such waste water is the equivalent of the riparian rights of Miller & Lux to the waters of the San Joaquin River, and which riparian rights it is intimated (but not asserted) that complainant destroyed by appropriating the waters of that river by its canal. There could be no such destruction or depreciation of such riparian rights, unless Miller & Lux, or complainant, can prove, which neither has attempted to do, that the appropriation by complainant of the waters of this river had deprived Miller & Lux of any considerable portion of its waters which they were entitled to use as riparian owners. It cannot be claimed and is not claimed or shown by any evidence in this record that Miller & Lux ever owned all the waters in the San Joaquin River as riparian owners, and even if they had owned or do now own all such waters, there is no principle of law that would compel complainant to transport any part of such riparian waters through its canal for seventy miles or for any distance, and deliver it free of charge as waste waters to Miller & Lux. It clearly appears from Exhibits 4, 5 and 6, already referred to, that Miller & Lux were most eager for the construction of this canal, for by those contracts and as inducement to complainant to construct the canal,

they gave complainant not only a large surplus in money, but also a right of way over their lands in the three counties. Nothing is said in these contracts as to free water for irrigating uncultivated lands, but they did provide for irrigating cultivated lands, and their intent is clear that Miller & Lux were to pay for *all irrigation of their lands,* and that the only free water was for watering stock and for domestic purposes. Those prior contracts furthermore exhausted the alleged consideration of subsidy money and rights of way, which are again brought forward to do double duty as alleged consideration in this Exhibit E. Those considerations are plainly overworked. These prior contracts further plainly show that Miller & Lux consented to the appropriation by complainant of the waters of the San Joaquin River, and in any Court of law or equity they effectually estop any claim by them that such appropriation in any manner deprived them of their riparian rights.

The same may be said as to the further alleged consideration in Exhibit E, viz: that Miller & Lux have agreed to permit complainant to appropriate from this river an additional 350 cubic feet per second of water for the "outside canal," since it appears that Mr. Henry Miller was the moving spirit in building this outside canal in 1896 and 1897; that Miller & Lux built it for complainant and that, at no time until Exhibit E was executed, in May, 1899, was any claim ever made by Miller & Lux that they were

entitled to any consideration on account of the additional water that this "outside canal" should take from the river (Rec. 86, 87). Again, by the maintenance and operation of a proper dam and headgate complainant can take into its canal very little of this so-called waste water, and when there is any such waste water, for which there is no customer, it can return it to the river through any of the natural creeks crossing the canal mentioned in the testimony as waste ways (Rec. 125-6). If these creeks have been stopped up, the obstructing dams and levees have, it appears, been put there by Miller & Lux, and they should be compelled to remove them (Rec. 284).

It must be apparent from this entire record as to the contracts and dealings between Miller & Lux and complainant. First, that Miller & Lux encouraged and assisted complainant to appropriate from the San Joaquin River all the waters thereof that its canal can carry, and that their acts in that regard, estop them from ever claiming compensation in so-called surplus or waste water, or in anything else, even though they should show (which they have not) a destruction or impairment of the riparian rights by reason of such appropriation.

Second. That complainant, up to the time that Miller & Lux secured control of its stock and directors, refused to permit Miller & Lux to use, free of

charge, this so-called waste water to irrigate its uncultivated lands.

Third. That after Miller & Lux obtained control of complainant, it used and continues to use, free of charge, such so-called waste waters to irrigate at least 60,000 acres of uncultivated lands whereon they pasture thousands of cattle.

Fourth. That other persons using this so-called waste water are made to pay for it.

Fifth. That Exhibit E is but a labored attempt by complainant, acting under control of Miller & Lux, and after the discrimination had been set up by the answer in this suit, to justify and to advance if possible some excuse for such discrimination.

Sixth. That the revenue lost to complainant by this discrimination in favor of Miller & Lux, irrigating, as the evidence shows, at least 60,000 acres of uncultivated pasturage lands upon which they fatten thousands of cattle, is, at the reasonable rate of $1 per acre per year, the sum of $60,000 in each year. It is furthermore to be noted that this free water contract was made with Miller & Lux in May, 1899, and that it was not in existence when the Supervisors fixed the rates in June, 1896, and consequently the Supervisors had a right to proceed on the theory that complainant would charge Miller & Lux for all water used by them from this canal. It cannot be denied that, if complainant had never built its canal, Miller & Lux, in order to irrigate the 90,000 acres of culti-

vated and pasturage lands it now irrigates from complainant's canal, *would have been compelled to have built its own canal at a cost nearly, if not equal, to the cost of complainant's canal.*

This being so, this whole matter of discrimination amounts to this, that Miller & Lux, by obtaining control of complainant's canal, are relieved of the cost of building their own canal, and are irrigating about 90,000 acres of their land at comparatively little cost and to a great extent free of charge at the expense of the other consumers.

A Court of equity looks through the form to the substance. So here, this Court, sitting as a Court of equity, must clearly see, we think, from this record, that Miller & Lux, masquerading under complainant's name, *is the real complainant in this suit,* and that, if the Supervisors' rates are held invalid the real beneficiary will be Miller & Lux, who will continue in the future, as in the past, to wholly control complainant, to the end that it will irrigate their immense tracts of lands at comparatively small cost and to a large extent free, while the other unfortunate irrigators must pay higher rates to keep up the canal for the benefit of Miller & Lux.

We have already seen that, under the Constitution of 1879, "The use of all water now appropriated, or "that may hereafter be appropriated, for sale, rental, "or distribution, is hereby declared to be a public "use, and subject to the regulation and control of

"the State, in the manner to be prescribed by law." (Sec. 1, Art. XIV.) and by section 5 of the Act of 1885, that the public waters appropriated by complainant can only be sold or rented at rates fixed by the Supervisors, or in the absence of Supervisors' rates, "*at the actual rates*" established by the complainant. Complainant cannot give away any of such appropriated waters, or dispose of them, *except at "actual rates"* so fixed. In its bill of complaint in this suit, complainant distinctly alleges "That for "more than ten years last past, your orator has been "engaged, and is still engaged, in the business of ap- "propriating water for irrigation, sale, rental and "distribution *for hire,*" and in paragraph third, it set up the *money rates* charged by it to *all its customers* (Rec. 2, 3).

Upon these allegations, complainant came into a Court of equity, that is, upon allegations of equal *rates in money to all its consumers,* whereas, the evidence shows discrimination in favor of Miller & Lux, amounting to at least $65,000 in each year in irrigating both their cultivated and pasturage lands; the cultivated land at money rates less than those charged others, and the pasture land at no money, or other rate, at all.

Defendants specially set up in their answer in this suit these discriminations by complainant in favor of Miller & Lux (Rec. 19-29). They were argued on the trial, as the briefs show, and yet, the learned

Judge of the Circuit Court, in his opinion, merely referred to the fact that such matters had been set up as defenses, but he did not, in his opinion, again refer to them (Rec. 41).

As affecting the inquiry here, it is immaterial whether or not this alleged agreement as to waste water be valid or invalid between complainant and Miller & Lux. Nor can this Court be here concerned about complainant's minority stockholders, lying, as this record shows, cowed and invertebrate under the heel of Miller & Lux; but this Court can say here and decide as a Court of equity that, complainant, thus grossly discriminating in favor of its controlling stockholder, will not be heard to complain that the Supervisors' rates are unreasonably low, when, if such discrimination was not practiced, it is apparent that complainant's income would be ample, even under rates much lower than those fixed by the Supervisors, and complained of.

Galloway vs. *Finley,* 12 Pet., 297.
New York vs. *Pine,* 185 U. S., 103.
Roberts vs. *Northern Pac. R.* 158 U. S. 13.

THE LAW IN CALIFORNIA AS TO CONTRACTS WITH A WATER COMPANY FOR SPECIAL RATES.

In 1896, when the rates were fixed by the Supervisors of Stanislaus County, it was, and is now, the law in California that *in the absence of and until a*

fixing of rates by the Supervisors of a County under the Act of 1885, a water company and a consumer in such County might by contract provide for a water rate which each could enforce against the other.

Fresno Canal, etc., Co. vs. *Park,* 129 Cal., 437-445.

San Diego F. Co. vs. *Souther* (C. C. A.), 104 Fed. Rep., 706.

Souther vs. *San Diego F. Co.,* 112 Fed. Rep., 228.

But it has never been decided in California that a Court of equity would, on the application of a water company appropriating the public waters of the State for sale and rental, set aside the Supervisors' public rates as unreasonably low when, it at the same time appears, as here, that such water company is furnishing large quantities of its waters to a customer under special contracts for rates lower than the public rates complained and when that customer is shown to control the water company. Such a question presents the equitable rights of the consumers under the public statutory rates against the water company complaining to a Court of equity of such public rates *when it is itself guilty of inequitable discrimination.* Such question is, for the first time, presented by this case, and is manifestly distinct from that involving the right of either party to such discriminatory rate-contract to enforce it against the other.

IN CONCLUSION.

Summarizing the salient points, we ask the Court to reverse the judgment of the Circuit Court and to dismiss the bill of complaint with costs.

First. Because the Circuit Court had no jurisdiction in equity of this suit on the ground of preventing a multiplicity of suits, or on any ground, since the defendants here sued, have no power anywhere given them to enforce the water rates complained of, and it is neither alleged nor proved that they are proceeding to, or threaten to, or that they, or any of them, can in any manner enforce said rates or injure complainant or its property and because such enforcement depends entirely upon the will and acts of the rate-payers who are not sued.

Second. Because the Circuit Court had no jurisdiction in equity, since complainant had an adequate remedy at law, in the right given to apply to the Board of Supervisors for new rates.

Third. Because, if the Circuit Court had jurisdiction, it erred in deciding that the original cost of the canal, and not its present value, was the basis upon which the rates should have been fixed.

Fourth. Because the Circuit Court erred in deciding the rates to be so unreasonably low as to de-

prive complainant of its property without due process of law, since it manifestly appears from the evidence that complainant's net annual income is ample under the rates complained of and that the same is increasing because of the fact that irrigation has greatly increased under those rates.

And furthermore, because it appears that complainant's revenues and income would be still further greatly increased did it not grossly and inequitably discriminate as to rates in favor of its controlling stockholder, Miller & Lux, and did it not give to such stockholder water free of charge.

Fifth. Because the Circuit Court erred in deciding that the rates complained of should be considered as applying in all three counties, when in law and in fact they could and did apply in Stanislaus County only.

Sixth. Because of such discrimination in favor of Miller & Lux, complainant is not in a position to claim in a court of equity that the Supervisors' rates are unreasonable.

Respectfully submitted,

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